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SUPREME COURT OF THE UNITED STATES  
COMMON TERM, 1951

No. 419

FEDERAL TRADE COMMISSION, PETITIONER

vs.  
THE RUBEROID CO.

No. 504

THE RUBEROID CO., PETITIONER

vs.  
FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 20, 1951  
(CASE NO. 419)

PETITION FOR CERTIORARI FILED DECEMBER 28, 1951  
(CASE NO. 504)

CERTIORARI GRANTED JANUARY 20, 1952

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 448

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE RUBEROID CO.

No. 504

THE RUBEROID CO., PETITIONER

vs.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

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1 In the United States Court of Appeals for the Second  
Circuit

THE RUBEROID CO., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*Appendix to petitioner's brief*

*Statement pursuant to rule 45 (b)*

Complaint issued by Federal Trade Commission July 26, 1943.  
There has been no change in parties.

Answer of the respondent, The Ruberoid Co., filed September  
24, 1943.

Hearings held before Charles B. Bayly, Trial Examiner, com-  
mencing March 7, 1946, and ending April 26, 1948.

Order to cease and desist issued January 20, 1950.

Petition for review filed April 25, 1950.

2 BEFORE FEDERAL TRADE COMMISSION

Docket No. 5017

IN THE MATTER OF THE RUBEROID COMPANY, A CORPORATION

*Complaint*

Filed July 26, 1943

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has been since June 19, 1936, and is now violating the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One. Respondent, The Ruberoid Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York. Respondent corporation is now and has been since June 19, 1936, engaged in the business of processing, manufacturing, offering for

sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products in all parts of the United States.

The respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating materials and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Maryland; Mobile, Alabama; Erie, Pennsylvania; Millis, Massachusetts and Chicago, Illinois. The respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicators" herein used applies to corporations, individuals, partnerships and firms known as building or roofing contractors who apply the products purchased from the respondent to buildings. The "applicators" usually sell the respondent's products to consumers on a contract basis, charging the consumer for the materials used and the labor employed in connection with the applying of the asbestos and asphalt roofing and insulating materials to buildings.

Paragraph Two. Respondent sells and distributes its products in commerce between and among the various states of the United States and in the District of Columbia and preliminary to or as a result of such sales, causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various states of the United States and in the District of Columbia other than the state of origin of the shipment and there is and has been at all times herein mentioned a continuous current of trade and commerce in said products across state lines between respondent's plants, factories or warehouses and the purchasers of such products. Said products are then sold and distributed for use and resale within the various states of the United States and within the District of Columbia.

Paragraph Three. In the course and conduct of its business, as aforesaid, respondent has been and is now in substantial competition in commerce with other manufacturers and sellers of asbestos and asphalt roofing and insulating materials and allied products and who for many years prior thereto have been and are now engaged in manufacturing, selling and shipping such products in commerce across state lines to purchasers thereof located in the various states of the United States.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas, in which respondent's said customers, respectively, offer for sale and sell the said products purchased from respondent.



Paragraph Four. In the course and conduct of its said business, since June 19, 1936, respondent has been and is now discriminating in price between different purchasers buying said products, by selling them to some of its customers at higher prices than it sells products of like grade and quality to other customers who are competitively engaged in the resale of said products within the United States with customers receiving the lower prices.

The respondent grants and allows to all of its customers a cash discount of 2% if the invoice is paid within a specified time.

Paragraph Five. The respondent has discriminated in price by the use of a so-called trade discount schedule whereby it has sold to some customers at higher prices than it has sold goods of like grade and quality to other customers who are in competition with them in the resale of said products within the United States. The so-called trade discount schedule includes two types of discounts, one known as a "distributor commission" and the other known as a "wholesaler discount." The trade discount schedule used by the respondent is more particularly described as follows:

5. (a) The respondent grants to some of its customers who are engaged in the resale of asphalt roofing products of like grade and quality in competition with other of respondent's customers, a "distributor commission" ranging from 5% to 10% to be deducted from the invoice price and a "wholesaler discount" of 5% off the invoice price.

The "wholesaler discount" of 5% allowed by the respondent to its favored customer is in addition to the "distributor commission" ranging from 5% to 10% granted and allowed to the same customers.

(b) The respondent grants to some of its customers who are engaged in the resale of asbestos shingles and siding of like grade and quality in competition with other of respondent's customers, a "distributor commission" of 5%, and in some instances 6%, to be deducted from the invoice price and a "wholesaler discount" of 6% off of the invoice price. The "wholesaler discount" of 6% allowed by the respondent to its favored customers is in addition to the "distributor commission" of 5%, and in some instances 6% granted and allowed to the same customers.

The "distributor commission" and "wholesaler discount" herein referred to are allowed to some and withheld from other customers of the respondent who purchase from the respondent asphalt roofing products and asbestos shingles and siding and allied products and who are in competition with each other.

Paragraph Six. The effect of the discrimination in price generally alleged in Paragraph Four hereof and of the discriminations specifically set forth in Paragraph Five hereof has been, or may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those from whom they are withheld. The effect also has been or may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in the said line of commerce in the various localities or trade areas in the United States where said favored customers and their disfavored competitors are engaged in business.

Such discriminations in price by respondent between different purchasers of commodities of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of Subsection 2 (a) of Section 1 of said Act of Congress approved June 19, 1936, entitled "An Act to Amend Section 2 of an Act Entitled, 'An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes' Approved October 15, 1914, as amended, U. S. C. Title 15, Section 13 and for Other Purposes."

Wherefore, the premises considered, the Federal Trade Commission on this 26th day of July A. D. 1943, issues its complaint against said respondent.

\* \* \* \* \*

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 26th day of July A. D. 1943.

By the Commission.

[SEAL]

Otis B. Johnson,  
OTIS B. JOHNSON,  
Secretary.

BEFORE FEDERAL TRADE COMMISSION

*Answer of the Ruberoid Co.*

Filed September 24, 1943

Now comes the respondent The Ruberoid Co., erroneously called "The Ruberoid Company" in the above-entitled complaint, and denies that it is now violating, or has ever violated, the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved

June 19, 1936, and for answer to the complaint in the above entitled proceeding the respondent says:

Paragraph One. The respondent admits that it is a corporation organized and existing under the laws of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York; that it is now and has been since June 19, 1936, engaged in the business of processing, manufacturing, offering for sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products in many parts of the United States; that it is one of the largest manufacturers and distributors in the United States of asbestos and asphalt roofing, insulating materials and allied products; that it maintains and operates branch warehouses and sales offices in Baltimore, Maryland; Mobile, Alabama; Erie, Pennsylvania; Millis, Massachusetts, and Chicago, Illinois; that it sells its products directly

8 to some wholesalers, to some retailers and to some "applicators"; that the term "applicator" herein used applies to corporations, individuals, partnerships and firms known as building or roofing contractors who apply the products purchased from the respondent to buildings; and that the "applicators" usually sell the respondent's products to consumers on a contract basis, charging the consumer for the materials used and the labor employed in connection with the applying of the asbestos and asphalt roofing and insulating materials to buildings. They deny all allegations of Paragraph One of the complaint not expressly admitted herein.

Paragraph Two. The respondent admits that in some instances it sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia, and that preliminary to, or as a result of said sales in some instances it causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various States of the United States, and in the District of Columbia other than the State of origin of the shipment. The respondent admits that there is and has been in some instances a current of trade and commerce in respondent's products across State lines between respondent's plant, factories or warehouses and the purchasers of such products. The respondent admits that its products are sold and distributed for use and resale within various States of the United States and within the District of Columbia. The respondent states that in many instances commerce between and among the various States of the United States or in the District of Columbia is not involved in the sale and distribution of the respondent's products. The respondent denies all allegations of Paragraph



Two of the complaint not expressly admitted herein.

9 Paragraph Three. The respondent admits that, in the course and conduct of its business, it has been and is now in substantial competition in commerce with other manufacturers and sellers of asbestos and asphalt roofing and insulating materials and allied products, who for many years prior hereto have been and are now engaged in the manufacturing, selling, and shipping of such products in commerce across State lines to purchasers thereof located in various States of the United States. The respondent admits that many of its customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers respectively offer for sale and sell the said products purchased from respondent. The respondent states that many of its customers are not competitively engaged with other customers of the respondent or with customers of respondent's competitors, and that many of said respondent's customers at times are engaged in such competition and at times are not so engaged. Respondent denies all allegations of Paragraph Three of the complaint not expressly admitted herein.

Paragraph Four. The respondent admits that it usually allows its customers a cash discount of 2% if the invoice is paid within a specified time. The respondent denies that it is now discriminating or has ever discriminated in price between purchasers of its products. The respondent denies all allegations of Paragraph Four of the complaint not expressly admitted herein.

10 Paragraph Five. The respondent states that it has been its general practice to grant to wholesalers who purchase its asphalt and asbestos roofing products a wholesalers' discount of 5% above the discount granted to retailers and applicators, but that this discount has varied from time to time and from place to place, depending upon competitive conditions in the industry. Respondent denies that it has ever discriminated in price as between purchasers of its products. The respondent states that any differentials in the prices of its products made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof, or were made in good faith to meet equally low prices of competitors. The respondent denies that the effect of any act committed by it and complained of herein may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. The respondent denies all allegations of Paragraph Five of the complaint not expressly admitted.

Paragraph Six. The respondent denies all the allegations of Paragraph Six of the complaint.

Wherefore, having fully answered, the respondent prays that the complaint be dismissed.

THE RUBEROID CO.,

By \_\_\_\_\_, President,

Address: 500 Fifth Avenue, New York 18, N. Y.

SPENCER GORDON,

WILLIAM M. AIKEN,

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,

Union Trust Building, Washington 5, D. C.

Attorneys for Respondent.

11. BEFORE FEDERAL TRADE COMMISSION

*Transcript of testimony.*

COURT ROOM 245, UNITED STATES POST OFFICE,  
600 Camp Street, New Orleans, Louisiana,

March 7, 1946.

Met, pursuant to notice, at 10:00 a. m.

Before CHARLES B. BAYLY, Trial Examiner.

Appearances: James I. Rooney Attorney for the Federal Trade Commission. William M. Aiken, Attorney for the respondent The Ruberoid Co. (Covington, Burling, Rublee, Acheson & Shorb, 701 Union Trust Building, Washington, D. C.)

\* \* \* \* \*

ERNEST J. O'LEARY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. For the record, please state your full name, Mr. O'Leary.—

A. Ernest (Spelling) E-r-n-e-s-t J. O'Leary (Spelling) O'-L-e-a-r-y.

Q. And you reside where, Mr. O'Leary?—A. 1509 Kingsway (Spelling) K-i-n-g-s-w-a-y Road, Baltimore 18, Maryland.

12 Mr. ROONEY. At this point, Mr. Examiner, I'd like the record to show that Mr. O'Leary has appeared here at New Orleans through the consent of counsel for the respondent, and the Commission will not be responsible for his travel from Baltimore to New Orleans—to the local area of New Orleans itself.

Trial Examiner BAYLY. That's agreeable to you, Mr. Aiken?

Mr. AIKEN. That is agreeable.

Trial Examiner BAYLEY. Very well.

By Mr. ROONEY:

Q. What is your position with The Ruberoid Company, Mr. O'Leary?—A. I am Sales Manager of the Southern Division of the Ruberoid Company.

Q. And the Southern Division includes what area?—A. The Southern Division embraces the following territory: Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, and parts of Tennessee.

Q. How long have you been in that position, Mr. O'Leary?—A. Since approximately November 6, 1945, by designation; but from the standpoint of activity, since approximately January first of 1946.

Q. Prior to that time, what was your position?—A. Prior to that time I was Manager of the Mobile District.

Q. Would you tell us what the Mobile District included?—A. The Mobile District comprised the following territory: Florida, approximately one-half of Georgia, Alabama, Mississippi, Louisiana, Texas, the greater part of Arkansas, and parts of Tennessee.

Q. Would you tell us, in a general way, what products the Ruberoid Company manufactures in the Mobile area?—A. At the Mobile plant, which serves the so-called Mobile District area, we produce asphalt roofing and siding products, built-up roofing materials of asphalt nature, asbestos cement roofings and sidings, asbestos cement wallboard, roof coatings, and plastic cement of asphalt base. That, in general, is what we produce.

Q. When you say that, roofing products, that includes shingles?—A. That includes shingles and roll roofings.

Q. Now, at the request of counsel, on March first, you were requested to bring certain documents to the hearing this morning?—A. Yes.

Q. And you have brought, pursuant to that, the copies of all your price lists published by The Ruberoid Company—published from June 19, 1936, to date?—A. Yes; to the best of my knowledge that file contains that information.

Q. We will pass those for the time being and take them up at a later time. Now, you were requested to bring the published discounts, if any, which The Ruberoid Company allowed its customers from June 19, 1936, to date?—A. Those published discounts, in the main, are included in the price file—the information file that I have brought.



Q. I see. These are included in the price file?—A. Such published discounts as were available, or were published in the trade.

14. Q. Now, you were also requested to bring any published classification of The Ruberoid Company's customers, from June 15, 1936, to date?—A. Such published classification as were available, or issued, have been brought, to the best of my knowledge.

Q. They are included—A. They are included in that file.

Q. In that file of prices?—A. Yes, sir.

Q. Now, were there any discounts allowed to customers that were not published?—A. Yes; at times discounts were allowed to certain classes of customers that were not published.

Q. Would you tell us what classification of customers, the Respondent had? How did they classify their customers?—A. In general, that classification was grouped into two parts: Part One was the wholesaler, or jobber, or wholesale-distributor. Those designations generally classify a particular group.

Two: Retail merchants. In that category falls lumber and building material dealers, hardware dealers, roofing contractors, or applicators.

Q. Those were the two classifications?—A. The two basic classifications.

Q. Now, do you have any other classifications? You mention "basic."—A. At times, in the past, to the best of my memory, we have sold to the Federal Government, as a specific classification. Also, to industrial buyers, as a specific classification.

Q. Would you elaborate what you classify in those two items?—

A. I refer to a manufacturing concern in most cases; the type that would, perhaps, function in an interstate manner. Take a concern like—well, American Can Company would be a national industrial, or an industrial buyer. We'll say General Motors would be an industrial buyer, or any of the steel mills, or things of that character.

Let me say, at this point, that our activity with respect to sales to these classes of buyers has changed during the period covered by the price information that you have requested.

Q. Would you tell us, if you can, what changes there were?—

A. It is quite possible—and I say this from memory, because of the period of time involved, the length of time involved—it is quite possible that we might have discontinued sales direct sales, to an industrial buyer. That, in the main, would be the published change that might have taken place.

Q. Now, how about any unpublished change that might have taken place?—A. That would be brought about, in the main, by competitive conditions.

Q. Now, this latter classification, or this latter change that you mentioned: due to competitive conditions. Did that result in a change of your basic classifications?—A. No; it did not.

Q. Could you tell us, Mr. O'Leary, from your knowledge, without going into the published price lists at the time being—could you tell us, generally, the discounts allowed to your customers classified under Group One, which you describe as wholesalers or jobbers, or wholesale distributors?—A. Mr. Rooney, those discounts have varied and changed considerably over the period of time involved. I can submit our prevailing discount picture—

16 Q. Well, what is your prevail—A. If that will help the situation, and I was thinking, generally, that that's what's happened.

First, I must point out that different merchandising plans, or distributing policies have prevailed on asphalt products as compared with asbestos cement products.

Mr. ROONEY. Mr. Reporter, would you repeat that?

(The reporter read the answer as follows:

"First, I must point out that different merchandising plans, or distributing policies have prevailed on asphalt products as compared with asbestos cement products.")

Q. You may go ahead.—A. The historical background covering the sale of these products has brought about a situation of that kind, for the most part.

Q. And what brought that about?—A. Well, I said, Mr. Rooney, the background: they are two different products. As roofing material, in the past, the relation with respect to their use has not been especially similar. In general, most applicators of asphalt products did not apply asbestos cement products. When I say that, of course, I refer to a general scope; not specifically to an area.

Q. Could you elaborate on that a little bit?—A. I will go to this extent: Asbestos cement roofing shingles have been, in the past, recognized as a hard roofing material, similar to slate. It has always been the practice of—in application, for slate to be put on by so-called roofers who specialized in that type of work.

Asbestos cement shingles, roofing shingles, were applied, 17 chiefly throughout the country, to my knowledge, by that class of person. The average carpenter who can—does—and has applied asphalt roofing shingles, invariably kept from

applying asbestos cement roofing shingles because of the greater difficulty of application.

Q. And for that reason you make a distinction between the two?—A. That distinction existed prior to 1936.

Q. I believe this all started out by my asking you what the present discounts were. Now, will you go ahead and give us—A. Will you repeat your question, please?

Q. Give us the present discounts which you give to the various classifications?

Trial Examiner BAYLY. Is that the discounts allowed but not published that you were talking about?

Mr. ROONEY. Published or unpublished.

A. Our published discounts on asphalt roofing products are as follows: Carload—you might put in brackets "rail." (Rail) Carload, or 10-ton truck shipments: carload list price, less 5 percent.

Less than carload, or less than 10-ton truck shipments, list price less 6 and 5 percent.

Mr. AIKEN. Off the record for a moment?

Trial Examiner BAYLY. Off the record.

(Discussion off the record.)

Trial Examiner BAYLY. Hearing resumed.

18 By Mr. ROONEY:

Q. In other words, any customer who buys carload or 10-ton truck shipments gets the 10-ton-carload list, less 5 percent?—A. The O. P. A. price regulations require that we may not sell any customer at any higher price than those published discounts on that quantity material.

Q. Let me frame my question this way, Mr. O'Leary: Regardless of classification, whether you classify them as a wholesaler or jobber, or a wholesaler-distributor, or a retail merchant, if they buy quantities of carload or 10-ton truck shipments, they get the carload list price less 5 percent?—A. Yes; under present conditions.

Q. And if they buy less than carload or less than 10-ton truck shipments they get the ECL list price less 6 percent and 5 percent?—A. They receive not less favorable than that.

Q. I am not asking you whether it's less favorable or not; I am trying to get a statement. Any customer, now, whether he be a wholesaler or a jobber or a wholesale-distributor, if he buys less than carload, or 10-ton truck shipment, he gets the LCL price, list, less 6 percent and 5 percent. Is that right?—A. No; that is not true.

Mr. AIKEN. Well, may I interrupt?



Trial Examiner BAYLY. No. Go right ahead. You keep a notation and take up the witness.

Mr. AIKEN. May I go off the record a second, Your Honor?

Trial Examiner BAYLY. Yes. Off the record.

(Discussion off the record.)

19 Trial Examiner BAYLY. Hearing resumed.

During this time, counsel have had an informal discussion with a view to clarifying the line of questions to be put to the witness.

Mr. ROONEY. What was that last question?

(The reporter read the question as follows:

"Q. I am not asking you whether it's less favorable or not; I am trying to get a statement. Any customer, now, whether he be a wholesaler or a jobber or a wholesale-distributor, if he buys less than carload, or 10-ton truck shipment, he gets the LCL price, list, less 6 percent and 5 percent. Is that right?")

A. Because we extend a more favorable discount to the wholesaler than we do to the retail merchant.

By Mr. ROONEY:

Q. So that when you say that your discount on less—LCL, or less than 10-ton truck shipments, it's the LCL price, list, less 6 percent and 5 percent, that is not entirely true?—A. It is generally true; perhaps, not entirely true, with the exceptions that I stated in the foregoing comments, and with the exceptions as I explained in previous testimony, that might be brought about by competitive conditions.

Q. Well, in other words, if you have classified one of your customers as a wholesaler, and he buys LCL, or less than 10-ton truck shipments, he isn't billed at the LCL list price less 6 percent and 5 percent?—A. Those occasions have happened; yes. The answer to your question is yes.

Q. So that rather than your discounts being based on quantity, it is based on classification?—A. I would say yes.

Q. And regardless of what quantity any customer whom you classified as a wholesaler purchased, he would get the CL list price, less 5 percent?—A. That is not always true, Mr. Rooney, because of competitive conditions that exist in different localities that bring about the matching of that competition.

Q. Well, then he might even get a better price than that, regardless of the quantity?—A. Possible, but not probably.

Q. The reason I asked you that is because you just said that there are other factors that might enter into it, such as competitive conditions, so I say, if the other factors—you mean he would get an additional discount?—A. In general, that certainly would

not apply to LCL shipments, Mr. Rooney, because of the—well, the expense of transportation would enter into that, for instance, on an LCL shipment.

Q. You understand, Mr. O'Leary, I am not trying to say what he gets or what he doesn't get. I am trying to find out.—A. I am trying to tell you, but it is rather complex.

Q. Now, would a customer whom you do not classify as a wholesaler or an industrial customer, I believe you called them—now, if that customer bought carload or a 10-ton truck shipment, would he get the CL price, list less 5 percent, or would he get the LCL price, list less 6 percent and 5 percent?

21 Mr. AIKEN. May I have that again, please? Will you read it to me, please?

(The reporter read the question as follows:

"Q. Now, would a customer whom you do not classify as a wholesaler or an industrial customer, I believe you called them—now, if that customer bought carload or 10-ton truck shipment, would he get the CL price, list less 5 percent, or would he get the LCL price, list less 6 percent and 5 percent?"

A. He would receive the carload price, list less 5 percent.

By Mr. ROONEY:

Q. He would, regardless of the classification?—A. Regardless of the classification.

Q. Now, that is what I am trying to find out, Mr. O'Leary. What is the basis for your discounts?

Mr. AIKEN. Well, may I go—

A. Well, that question is very complex to me.

Trial Examiner BAYLY. Did you want to make an objection to the question?

Mr. AIKEN. May I go off the record again? No, I didn't want to—

Trial Examiner BAYLY. Did you have an objection?

Mr. AIKEN. No. May I go off the record just a second?

Trial Examiner BAYLY. Off the record.

(Discussion off the record.)

22 Trial Examiner BAYLY. Hearing resumed.

Now, Mr. O'Leary, if you can answer that question as accurately, as you can.

The WITNESS. Well, Mr. Examiner, I don't understand the question exactly, because I don't know whether or not Mr. Rooney is asking me how we arrived at that carload list price and how we arrived at that 5 percent published discount.

Mr. ROONEY. I wouldn't know.

The WITNESS. Nor would I.

By Mr. ROONEY:

Q. You don't know?—A. I wouldn't know.

Q. Why is this question of discounts complex?—A. Because, as I have just said, if you are asking me how we arrived at a particular carload price, published carload price, and how we arrived at a particular 5 percent published discount, I couldn't give you a logical answer to that, Mr. Rooney.

Q. Well, is it a fact, Mr. O'Leary, that you have a lot of discounts that you give that are not published?—A. No; it is not.

Q. The reason I ask that is because Mr. Aiken seemed to mention that I had in mind published discounts and you had in mind unpublished discounts.—A. No; as I explained in the foregoing testimony, Mr. Rooney, we sell two classes of trade, in general: we sell wholesalers, who are in one group, and retail merchants who are in the other group.

Q. Now, that is clear. We've got that! You have two general classifications of customers. Are those the basis of discounts?—

A. Yes.

23 Q. There is no mistake about that?

Mr. AIKEN. Off the record?

Trial Examiner BAILEY. Just a minute. We are on the record here.

By Mr. ROONEY:

Q. Now, there is no mistake about that, is there?—A. I don't see that there is.

Q. All right, now. So that the discounts of any customer, that he receives from you, depend on whether he is in the wholesale classification or in the retail classification?—A. I would say that was largely so.

Q. So, if John Jones is classified by you as a wholesale customer, if he buys 10 squares of shingles, he gets the wholesaler's price?—A. Yes.

Q. And if Frank Brown is a retailer; under your classification, and he buys a hundred squares of shingles, he gets it at the retail classification?—A. At the merchant, or dealer's price; yes.

Q. Now, there was nothing odd about that, was there?—A. No. No. I just didn't understand your question before, Mr. Rooney. Rest assured, I am trying to give you the information you are seeking.

Q. Yes. Now, the discounts which you have just given us: that is, the CL less 5 percent, and the LCL, less 6 percent and 5 percent, are the present discounts. Is that correct?—A. Yes, sir.

Q. Now, do you know what they were prior to that change?—A.



Well, from the period of these price lists to the present date they varied so considerably that I wouldn't attempt to tell you, from memory.

24 Q. But they have varied considerably?—A. They have varied; yes, sir.

Q. I believe you did say that your customer would get—

Mr. ROONEY. Strike that.

Q. I believe you did say that were other discounts than the published discounts?—A. I did.

Q. Now, when, where, and how are they granted?—A. We grant, under the present sales policy for these asphalt roofing products, to the wholesale distributor of Ruberoid products, an additional 5-percent discount.

Q. So that while your published discounts for a wholesaler are CL price list, less 5 percent, they are, in actuality, now CL price list less 5 percent and 5?—A. That is not quite true, Mr. Rooney. Our published discounts are not specifically to the wholesaler. I don't believe that I stated that.

Q. They are not specifically to the wholesaler?—A. Not specifically to the wholesaler.

Q. To whom are they? To whom do they apply?—A. They are designed chiefly for the so-called retail dealer or merchant, but our sales under those published discounts must necessarily be influenced by OPA regulations.

Q. Why don't you publish the additional 5 percent to wholesalers? Or, let me put it this way: Why do you publish some and not the others?

Mr. AIKEN. I object to that. It is immaterial.

Trial Examiner BAYLY. Oh, I think that is competent. He may answer it.

Do you understand the question?

25 The WITNESS. Yes; I understand the question, Mr.

Examiner.

A. I don't know.

Mr. ROONEY. I wonder if we could take a five-minute recess?

Trial Examiner BAYLY. Yes.

(A short recess was taken.)

Trial Examiner BAYLY. The hearing is resumed.

By Mr. ROONEY:

Q. Mr. O'Leary, how do you classify a customer as a wholesaler?—A. A wholesaler is a concern who is generally recognized in its community as such, who usually buys his stocks—our Ruberoid asphalt products—exclusively—chiefly sells them to the retail dealer or merchant class of trade, who generally have a sales

organization who develop and promote the use of our products.  
 Trial Examiner BAYLY. Warehouses the material, would you say?

The WITNESS. Maintains an establishment for properly warehousing the materials for servicing their customers.

By Mr. ROONEY:

Q. Who do you classify, in New Orleans, as a wholesaler?—A. In the New Orleans area, in New Orleans as wholesalers of our asphalt products, we presently classify Crescent Materials Service, and Brandin Slate Company. I would say that is all we classify as wholesalers.

26 Q. Now, how do you classify a customer as a retail merchant?—A. A retail merchant or dealer is an individual or concern who maintains and operates an establishment, usually office and warehouse, in which he stocks our material—stocks Ruberoid material—usually on an exclusive basis, for servicing the demands of consumer buyers.

Q. In other words, he is an applicator?—A. He may well be an applicator.

Q. Now, who, in the New Orleans area, do you have classified as of that group?—A. You are referring to today, Mr. Rooney?

Q. Yes.—A. To today! National Roofing Company. Hibernia Roofing and Metal Works. F. J. Villars.

Mr. Examiner, I'd like to find out the number I have listed.

Trial Examiner BAYLY. Would the reporter read back to Mr. O'Leary what he said there?

(The reporter read the answer as follows: "National Roofing Company. Hibernia Roofing and Metal Works, F. J. Villars.")

A. They are the ones that I can remember at the present moment that we sell to on a dealer basis, directly. That's the way I understand the way your question was.

Q. Now, I notice that you have confined these answers to the present time.—A. Yes, sir.

Q. Was there a time when you had others that were included in either one of these classifications?—A. Yes, sir.

27 Q. When you say "the present time," that includes how far back, or how long a time back? How long has this present group been in that class?—A. I would say immediately before the war we sold a greater number of that type of customer.

Q. Was there a time when you had any other customers than Crescent Materials Service and Brandin Slate Company as wholesalers?—A. None that we looked upon as our Ruberoid wholesalers, such as I have described the wholesale Ruberoid wholesaler.

Q. Now, was there a time when you had any other customers

than National Roofing, or Hibernia Roofing, or Villars in the group of retail merchants?—A. Specifically, I can't say that there have, although we have sold, in the past, prior to the war particularly, from my memory, other people in that class of business.

Q. Could you name some of them?—A. A. H. White Roofing Company. This is the dealer classification, now, I will take first: A. H. White Roofing Company. David Usner Sheet Metal Works; Albert Brandin Slate and Roofing Company.

Q. What was that last one?—A. Albert Brandin Slate and Roofing Company. Joseph Modenbach. Jordy Brothers. During that period which was prior to the war, we sold materials directly to J. Wilton Jones.

Q. That is, in this classification?—A. No, sir.

Q. In the wholesaler?—A. Yes, sir; in the wholesaler class. Generally, the wholesaler classification—not our Ruberoid wholesale classification, but operating in competition with our wholesalers, so to speak.

Q. Any others you can think of?—A. To the best of my recollection, no, Mr. Rooney.

28 Q. Now, do I understand, Mr. O'Leary, from your testimony now, that your only two wholesale customers are Crescent Material Service and the Brandin Slate Company?—A. No; I think—on asphalt roofing products, we are specifically on asphalt roofing products, are we, Mr. Rooney?

Q. I mean, on anything you sell, whether it's asphalt or asbestos.—A. Well, I would like to make clear, further, the difference between asphalt and asbestos products.

Q. All right.—A. On our asphalt products, under today's pricing policy, as a general rule, we sell carload and 10-ton quantities to the wholesaler, or jobber, who handles Ruberoid products chiefly on an exclusive basis, or the basis of CL price, less 6 and 5 percent. To the retail merchant, or roofing contractor, who, in general, complies with the definition that I gave in the foregoing testimony, on carload or 10-ton truck shipments, we give a 5-percent discount. Now, getting to our asbestos shingle pricing policy—

Q. Now, this you just mentioned is asphalt?—A. That is asphalt.

Q. All right. Now, go ahead. I'm sorry to have interrupted you.—A. In general, our policy is to classify so-called asbestos shingle distributors—

Mr. ROONEY. What was that answer?

(The reporter read the answer as follows:

"A. In general, our policy is to classify so-called asbestos shingle distributors.")



29 A. Who buy and stock our asbestos roofing and siding products, and generally handle them on an exclusive basis; have a sales organization for the development and promotion of the use of those products, and have those products available to the dealer and consumer trade.

Then, we have another group; another price. That is the men we classify as the asbestos shingle distributors, that we give our maximum 5 percent.

Q. Would you define—A. I defined the asbestos shingle distributor. His price is CL 6 and 5 percent, on carload or 10-ton truck shipments.

Now, that discount may be extended to a concern who may classify themselves as wholesale, and may even function as such, or to a roofing contractor, or dealer, who performs the function of warehousing our materials, distributing them to the various classes of buyers, and promotes their use, usually on an exclusive basis.

Q. Now, what customers do you have in that classification?—

A. In that classification, today, in New Orleans—

Q. Yes.—A. We have Brandin Slate Company, Hibernia Roofing and Metal Works, National Roofing Company, F. J. Villars, and Crescent Material Service.

Mr. Examiner, will you have the reporter read back to me those various people I listed under our asphalt categories? I am trying not to overlook anybody but I am dealing largely from memory rather than from notes, as you can see.

Trial Examiner BAYLY. Mr. Reporter, read that back and the witness can make a little note of what he's said, so he can clarify his answer.

Mr. ROONEY: Maybe if I put it this way, we can clear the record:

30 By Mr. ROONEY:

Q. Do I understand, Mr. O'Leary, you want to add to your list of wholesalers, at the present time, to Crescent Material Service and Brandin Slate Company, also—A. Cahn Bros. and Ryder.

Q. Cahn Bros. and Ryder?—A. Yes, sir.

Q. Now, I believe you had given the names of Brandin Slate, Hibernia Metal—A. As people whom we were selling in 1941. Is that right? Or, not '41, but prior to the war.

Mr. AIKEN. No; you were giving the names of your present asbestos distributors.

A. Oh; that is right.

By Mr. ROONEY:

Q. The last name you gave was Crescent Materials.—A. That is five?

Q. That's right.—A. That's right.

Q. Now, did you, at any time, have other customers in that classification, on asbestos shingle distributors?—A. Yes, sir; on other occasions we have sold retail merchants or roofing contractors. In most instances for specific job requirements, on the basis of CL less 6 percent.

Q. Who was included in that group? Could you give us the names of those?—A. To the best of my knowledge, in that group were included A. H. White Roofing Company, Joseph Modenbach, Jordy Brothers, David Usner Sheet Metal Works. That's all I can recall without going back to my records.

31 Q. In order that it might be clear in the record, Mr. O'Leary, you distinguish between present customers and customers in the past. Is that right?—A. Yes. You are asking me to do that?

Q. Well, no. I say, you have. You have given us a list of present customers and you have given us a list of customers in the past.—A. Yes, sir; I have done it, Mr. Rooney, because war conditions brought about changes among that class of trade.

Q. Well, now, for example, do you sell, today, to Joseph Modenbach?—A. Directly?

Q. Yes.—A. No, sir.

Q. Do you sell to Jordy Brothers?—A. No, sir.

Q. Do you sell to A. H. White Roofing Company?—A. No, sir.

Q. Do you sell to David Usner Sheet Metal?—A. No, sir.

Q. Do you sell to Albert Brandin Slate Roofing Company?—A. No, sir.

Q. When did you stop selling them?—A. I don't know, without referring to our records. Might I point out that some of those concerns, to my knowledge, are out of business today?

Q. The A. H. White Roofing Company is out of business?—A. Yes, sir.

Q. How about David Usner?—A. I think, Mr. Rooney, that David Usner suspended operations during the war because the owner, or head, of that business was brought into the armed services. I believe that he has resumed operations now, but frankly, I am not familiar with the individual or intimately connected with the account.

32 Q. And Jordy Brothers, you say you are not selling to them?—A. I don't know whether or not they are operating. I am not familiar with them. Albert Brandin is dead, I believe. If I am not mistaken their business has been dissolved.

Mr. ROONEY. I would like to take a minute, your Honor.

Trial Examiner BAXLY. Very well.

(A short recess was taken.)

Trial Examiner BAYLY. We will resume.

By Mr. ROONEY:

Q. Did you ever have a customer, the American Slate and Roofing Supply Company, that you know of?—A. I can't recall. We may have, but I would have to check our records.

Q. Do you know whether they are in business today or not?—

A. No, sir; I am not acquainted, or have not been acquainted with that concern, personally, or otherwise.

Q. So these customers that come in within the classification that you have just given, the asphalt wholesalers, and the asphalt retail dealers, and the asbestos shingle distributors—they get those discounts, based upon those classifications?—A. Generally speaking, I would say that's so.

Q. Why do you say "generally speaking"? Are there any discounts they will get?—A. No, sir; no, sir. No more favorable discounts, if that's what you mean, Mr. Rooney. No, sir.

Q. Well, would they get less?—A. I would say not. No, sir; not to my knowledge.

33 Q. And that, regardless of the quantity they bought?—

A. In this New Orleans area, I would say that's yes; the answer to that would be yes.

Q. Now, do you—at the present time, are you selling asbestos shingles to any customers other than Hibernia, Brandin, National, Villars, and Crescent Materials?—A. Not that I know of, directly; no, sir.

Q. When did you stop selling other customers directly that you previously had sold?—A. Well, I explained previously, Mr. Rooney, that those times may have varied; we had changing conditions. I do know this particular group changed, that we talked about. I think they changed, probably right after the war started. I think that brought about some radical changes.

Q. In other words, they mostly went out of business?—A. Generally speaking, that is true. I hate to use the words "generally speaking," but that was true in most cases, with the possible exception of Modenbach. Usner, as I say, has come back into business, having come back from the armed service. I believe A. H. White, Albert Brandin (and I am not certain about Jordy Brothers), are no longer functioning, as concerns of that character.

Q. Now, these asbestos shingle distributors: they get this discount whether they are wholesalers or applicators?—A. That is possible, yes. They do, in New Orleans.

Q. Don't they in other places?—A. Other places? No. That may not be true. We may have some other condition that would dictate a slightly different price policy.



Q. Why is it in New Orleans and not in other places?—A. Because of competitive conditions.

34 Q. In other words in New Orleans you have a highly competitive condition among your customers?—A. Yes, sir; we have two local manufacturers of asbestos and cement products at New Orleans.

Q. Well, now, you are speaking of your own competitive—your own competitors or your customers?—A. Our competitors.

Q. Your competitors?—A. Which bring about those competitive price conditions.

Q. In other words, your asbestos shingle distributors, in other places, don't get the same discount that the New Orleans distributor gets?—A. Yes; they do. Our asbestos shingle distributors in other places receive the same discounts, but I have pointed out—I wish to point out, in other localities, we may sell two accounts; say, if we are dealing with two accounts—usually we deal with one. If we deal with two accounts, one account may be a recognized wholesaler, and the other account will be specifically a retail merchant, and we provide a difference there—

Q. Now, that's—A. To the extent of 5 percent.

Q. That is what I am getting at. In other localities you would give a wholesaler his CL—A. That's 6 and 5 percent.

Q. 6 and 5 percent?—A. Yes, sir.

Q. You would give the retailer, CL at 5 percent?—A. Less 6 percent. CL less 6 percent. We are dealing with asbestos cement products.

Q. I am dealing with asbestos.—A. There is a difference of only 5 percent between the asbestos shingle distributor and the retail merchant. We give the distributor 6 and 5, and we give the retail merchant 6.

Q. I see. So that the wholesaler gets 5 percent addition. In other localities, that is, than New Orleans?—A. That's right.

Q. Because you have, in those localities, either one or two dealers. You have a wholesaler—a wholesale customer and you have a retailer?—A. That's true.

Q. Here in New Orleans, you say, that all of them get the 6 and 5, whether they are wholesalers or whether they are applicators?—A. If they perform the functions and services as I have outlined in my definition of our asbestos distributor. In other words, buy and warehouse our materials and have a sales organization for promoting and developing its use, et cetera.

Q. But, they still may be applicators?—A. That's highly possible.

Q. They still may be applicators?—A. Oh, yes, sir; yes.

Q. So that your applicator, here in New Orleans, gets the additional 5 percent?—A. He may; yes, sir; that specific group of 4

who do application work receive that maximum discount, which is due to competitive conditions in this local area.

Q. Well, do you mean competitive between themselves?—A. Competitive between ourselves and other manufacturers of similar products.

Q. Well, how would that affect them as far as—wouldn't you have competitors in the other districts?—A. Yes, sir; we'd have competitors in the other districts, but they might not sell on the same basis in the other districts as they do in this local district, if I make myself clear.

36 Q. Frankly, you don't make it clear to me, Mr. O'Leary.—A. Well, they may have a policy in this local area of selling applicators, wholesalers, and retail merchants, who buy and stock their materials, et cetera, on their most favorable discount, which is 6 and 5 percent.

Q. To all?—A. To all those people they are selling—I say, they may do that. I am referring—

Q. I mean, do they or do they not? You are saying this is because of competitive conditions. Do they or don't they?—A. We know they do in the specific case of one customer; of one of our competitive manufacturers; yes, sir. We know that customer functions as an applicator and we have every reason to believe that he receives the maximum discount that may be available on the part of that manufacturer.

Q. You mean your competitor?—A. Our competitor.

Q. I mean, you only know of one instance?—A. I could cite, probably more instances, Mr. Rooney, but it is purely surmise, I'll grant you.

Q. Purely surmise.—A. Exactly. I have no circumstantial evidence to that effect.

Q. Well, isn't it a fact, Mr. O'Leary, that here in the New Orleans market, not from the manufacturer's standpoint, but from the customer's standpoint, it's a highly competitive line, among the dealers in asphalt and asbestos products?—A. Usually, yes. 4 Specifically, today, no, on asbestos and cement products.

Q. Well, on asphalt products?—A. On asphalt products, as to some extent today, because of the existing condition of supply and demand which has brought about an entirely different picture insofar as the over-all competitive condition is concerned.

37 Q. And prior to the war you had a highly competitive condition?—A. Prior to the war, I'd say this was a highly competitive market; yes, sir.

Q. And when I say "highly competitive" I mean between dealers between applicators and purchasers of asbestos prod-

ucts.—A. I am not entirely familiar with that, Mr. Rooney, because my dealings are with our accounts, our dealers themselves.

Q. Yes.—A. And I know only what they tell me, of course. I know that, for instance, among the accounts that we have sold on that 6 and 5 basis, people with whom I am familiar because of my capacity, that the competition between those groups, plus similar groups sold by other manufacturers—

Q. Yes.—A. Was what you might term "keen."

Q. Yes.

\* \* \* \* \*

By Mr. ROONEY:

Q. Mr. O'Leary, when you left the stand this morning we were talking about the discounts of 6 percent and 5 percent which were given to wholesalers. Were there times when there was an additional discount of 2 and a half percent given to some of these customers?—A. Are you referring to asphalt products?

Q. Yes.—A. Yes; there was.

Q. And was that from January to April 1941?—A. As nearly as I can recall; yes.

38 Q. So that they got a 6 percent and 7½ percent?—A. That's correct.

Q. Do you know, offhand, what companies got that additional 2½ percent?—A. I think, Mr. Rooney, those discounts were extended to National Roofing Company, Hibernia Roofing and Metal Works, and J. Wilton Jones, during that 1941 period that you speak of.

Q. National Roofing?—A. Yes; and J. Wilton Jones.

Q. And Hibernia?—A. And Hibernia.

Q. What was the purpose of that additional 2½ percent?—A. To meet competitive conditions, to the best of my knowledge.

Q. Who was allowing an additional 2½ percent?—A. Specifically, it was reported to us that Flintkote was.

Q. Did you ever make any investigation to find out if that was a fact?—A. Other than I carefully questioned the representative—our representative who reported the situation to me, but, I might add, that it was purely a verbal situation and we had no opportunity to get written evidence of that competitive circumstance.

Q. Do you consider 2½ additional worth while, in your business?—A. I am not in position to answer that question, Mr. Rooney. That would be a matter of personal viewpoint, I think.

Q. In other words, you would have lost business if you hadn't given that additional discount?—A. It is highly possible we would. As a matter of fact, Mr. Rooney, I think I can elaborate



to this extent, that, the reported competitive condition, to us, was 5 percent better, and in meeting the competition we didn't go all the way; we temporized to the extent of approximately half that amount.

39 Q. I mean, you felt you had to go that far?—A. Yes; we did.

Q. In other words, you would have lost business if you didn't give that other 2½?—A. We feel we would; yes.

Q. Well, you wouldn't have given it if you hadn't?—A. That's right. We feel we would have lost business had we not given that discount. Yes; very definitely.

Q. In other words, you felt the 2½ percent additional discount was such to your customers that if they didn't get it they would have taken their business elsewhere?—A. I feel that way about it; yes.

Q. So, you considered it important enough for your business to give it?—A. Yes.

Q. Your customers considered it important enough to demand it, or else they would have lost business?—A. That appears to be the case.

\* \* \* \* \*

Mr. AIKEN. As to Exhibit 51, our copy does not show the pencil figures that appear to be on that photostat, that indicate that a 2-percent discount has been figured. I have no objection to the invoice itself, but we didn't put that on there.

Mr. ROONEY. Don't you give them 2-percent discount for cash? I don't mean for cash; I mean, within 10 days?

40 Mr. AIKEN. Whatever it is our answer admits it. Apparently Mr. Brandin was figuring his own discount there.

I don't care if it goes in, but as long as it is understood we don't do the figuring on it that is not in typing.

Trial Examiner BAYLY. Well, with that explanation in the record, the Trial Examiner will receive Commission's Exhibit 51 in evidence.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 51," was received in evidence.)

\* \* \* \* \*

Mr. AIKEN. Your Honor, I have no objection to the introduction of Exhibits 52 through—53, 54, and 55. I note, however, on invoices—on Exhibits 53 and 55, there is a 2-percent calculation which is not on Ruberoid's copy of the invoice.

Trial Examiner BAYLY. That is a penciled notation, is it, Mr. Aiken?

Mr. AIKEN. That appears to be a penciled notation.

Now, as to a number of the invoices, they have had penciled notations on them, which do not appear to be germane to any issue of this case, but for purposes of clarity, I think the record ought to show that those notations were not put on those invoices by The Ruberoid Co. Apparently they have been put on by the customer for his own purpose.

Mr. ROONEY. They might have been put on by Mr. Hall; I don't know.

41 Trial Examiner BAYLY. Have you anything further to say to that statement?

Mr. ROONEY. No; I have nothing further to say to that.

Trial Examiner BAYLY. Obviously, any notation figuring commission on the invoice, when the price discount is shown—and that, I take it, is the purpose for which the Commission attorney is introducing these invoices—is not particularly important to the issues.

With that statement that Mr. Aiken has made, the Trial Examiner will receive Commission's Exhibits 52 to 55, inclusive, in evidence.

(The papers referred to, heretofore marked for identification "Commission's Exhibits 52, 53, 54, and 55," were received in evidence.)

Trial Examiner BAYLY. If there is no objection—

Mr. O'Leary, you have testified about the special discount period in '41, and certain price concessions, or discounts which were extended by Ruberoid to a number of these companies. Who set this price policy? Do you know?

The WITNESS. Well, that would be set by our executives, or executive heads; our New York office is our executive head office, and any special discount beyond—in a specific area to meet a condition such as a competitive condition, would have to  
42 be approved by our headquarters at New York, in the final analysis.

Trial Examiner BAYLY. You were, and are, especially in sales?

The WITNESS. I am in sales at the present time, exclusively. During the period from the middle of 1940 through 1945 I was manager of the plant. I was manager of both the sales and manufacturing activities at Mobile for the Mobile District.

Trial Examiner BAYLY. Was there any specific change in your sales policy in the New Orleans area during this '41 period?

The WITNESS. No. I would say not.

Trial Examiner BAYLY. No special activities, in the way of sales; aggressive sales campaigns or anything of that kind?

The WITNESS. On our part, Mr. Bayly?

Trial Examiner BAYLY. On the part of Ruberoid.

The WITNESS. I would say not.

Trial Examiner BAYLY. Now, these invoices which are in evidence here: they represent actual executed sales. Is that your understanding?

The WITNESS. Yes, sir.

\* \* \* \* \*

Trial Examiner BAYLY. Let the reporter show that this hearing is now in session at 10 a. m., March 8, 1946.

43 CHARLES H. DIETRICH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Would you state your full name?—A. Charles H. Dietrich.

Q. Where do you live?—A. 3015 Royal, business address 2830 North Rampart.

Q. New Orleans?—A. New Orleans.

Q. What is your business?—A. Lumber, building material, slate.

Q. How long have you been in that business?—A. Twenty-five years on the first of last month.

Q. In the course of your business, do you have occasion to use roofing material, asphalt roofing material, asbestos roofing material?—A. Yes, sir.

Q. Have you ever purchased any of that material from the Ruberoid Company?—A. Yes, sir.

Q. Do you still purchase from them?—A. Not for quite a while.

Q. How long since you have purchased anything?—A. About five years—four or five years.

Q. In that roofing business, did you have any other competitors in New Orleans?—A. Yes, sir.

Q. Would you tell us who they were?—A. The nearest one, Hibernia Roofing & Metal Works.

Q. Any others?—A. Brandin and Jordy Bros., National Roofing Company, Chassaniol.

44 Q. Would you say that the competition in the roofing business here in New Orleans was pretty keen?—A. It was, sir.

Trial Examiner BAYLY. Tell us what you mean by that word "competition." What was going on?

The WITNESS. Well, the business was done on a close margin.

By Mr. ROONEY:

Q. Would you want to elaborate a little more on that?—A. Well, for instance, you get a rate or a discount. For instance, if

the discount were 20 percent and 6 percent or 5 percent and if a party didn't get the 5-percent discount, or the 6-percent discount, he could lose the business. A job of \$150.00, for instance, 6 percent of \$150.00 would be \$9.00 and that would cause him to lose that particular job.

Q. In other words, the competition was so keen that you had to figure pretty closely?—A. Yes, sir.

Trial Examiner BAYLY. This discount represented part of the profit or all of it?

The WITNESS. Wouldn't say it was part of the profit. It was a discount and eventually it would be a profit, but I would figure it as a cost.

By Mr. ROONEY:

Q. In purchasing from the Ruberoid Company, Mr. Dietrich, what discounts did you receive on the materials you bought?—A.

According to my recollection, it was 20 percent.

45 Q. Any other discounts?—A. I think they were going to allow me a six-percent discount but I don't remember whether I received it or didn't receive it.

Q. Any other discounts than the 20 and 6 you have already mentioned?—A. Those are all I remember.

Q. Did you know of any of your competitors that got better discounts than you did?—A. I don't know exactly but I think the Hibernia received a better discount than I did.

Mr. AIKEN. I move to strike the answer as speculation.

Trial Examiner BAYLY. It may stand. It is his general idea; he was dealing here in this community. It may stand.

By Mr. ROONEY:

Q. Did you ever buy merchandise from the Ruberoid Company in carload lots?—A. Yes, sir.

Q. By buying in the carload lots, did you get any special discounts?—A. I bought one carload lot in which my discount was 20 percent.

Q. And everybody got that 20 percent?—A. Well, some got 20, some got 20 and 6.

Q. Yes, but you didn't even get the 6?—A. Not in that case that I remember.

Q. You say you haven't bought any materials for the last five years from the Ruberoid Company?—A. About five years.

Q. From the Ruberoid Company?—A. Yes, sir.

46 Q. Can you recall any specific job that you figured on that some of your competitors figured on that you didn't get?—A. Not right now.



Q. So you feel that had you received the additional six percent that you would have been in a better position than these competitors which you spoke about?—A. Yes, sir.

Q. I think that's all.

Cross-examination by Mr. AIKEN:

Q. I don't believe I quite understand the character of your business, Mr. Dietrich.—A. Lumber, roofing.

Q. Now when you say roofing and when you are talking about these purchases from Ruberoid, were they purchased by you for over the counter sales or did you go out and apply them on a contract basis?—A. Both.

Q. Well, which was the principal part of your business?—A. Roof applying.

Q. On a contract basis?—A. Yes, sir.

Q. What other kinds of roofs did you put on?—A. Slate, asbestos, tar paper, galvanized iron.

Q. Would you say that you had purchased any materials directly from Ruberoid since 1940?—A. About that time in Mobile.

Q. Now, I believe you said that on these purchases you got twenty percent and that you might have received an additional six percent but that you don't remember clearly whether you got the additional six percent?—A. Correct.

Q. It's true, isn't it Mr. Dietrich, that in the application of roofing materials, that is, where you go out and get a contract job and bid on it, there are many other elements that are taken into consideration besides the materials themselves, that is, you have to figure your labor and overhead and other items of that kind and those of another into the contract price, isn't that true?—A. Well, they do, but the original purchase price is the principal one.

Mr. AIKEN. I see. I think that's all.

Redirect examination by Mr. ROONEY:

Q. Just one question, Mr. Dietrich. I show you Commission's Exhibit No. 56 for Identification and ask you if you can tell us what that is.—A. Yes, sir.

Q. Would you tell us what it is?—A. That was on a small shipment come by truck from Mobile, by the Herrin Lines.

Q. It's a copy of an invoice of merchandise purchased from the Ruberoid Company?—A. Yes, sir.

Q. I show you on that Commission's Exhibit No. 56 what appears in there in ink; was that put in by you?—A. I don't remember.

Q. You don't remember? The typewritten material on that was the invoice as it came from the Ruberoid Company. That wasn't put on by them?—A. Not that I remember.

Mr. ROONEY. I'd like to offer Commission's Exhibit No. 56 in evidence, if you please.

Trial Examiner BAYLY. Without objection—

Mr. AIKEN. Yes; I object.

Trial Examiner BAYLY. You mean you are offering it for identification?

48 Mr. ROONEY. No; I am offering it in evidence.

Trial Examiner BAYLY. Mr. Aiken.

Mr. AIKEN. I object to the offer, Your Honor. This is a copy of an invoice; we were not asked to produce it. I presume that the witness has the original. There's a discount figured on it, shown on the Commission's copy in pen and the witness doesn't seem to remember who put it on or why it was put on. This differs from all the other invoices that have been put in and there's a six-percent discount figured on the face of the invoice and the witness says in connection with this purchase—

Trial Examiner BAYLY. Just state your objection, no argument.

Mr. AIKEN. It isn't properly identified; a copy is not the best evidence.

Trial Examiner BAYLY. What do you say about that, Mr. Rooney?

Mr. ROONEY. I am rather interested, because only yesterday Mr. Aiken was very anxious to have it appear that all the invoices not received in evidence with the pencil and pen notations were not part of the Ruberoid's doings, so I take it that he feels a little different this morning and maybe the pencil notations on this is Ruberoid's—I don't know, but I assume that the same objection to the pencil notations on the invoice that he voiced yesterday would be raised to this one but apparently the tables have turned this morning and that he thinks the pencil notations might be theirs.

49 Trial Examiner BAYLY. The Trial Examiner is going to defer his ruling on this and we will consider it in connection with the other invoices handled in the same general manner. In the meantime, if you find it necessary, Mr. Rooney, to get the original, get the original.

By Mr. ROONEY:

Q. Mr. Dietrich, do you have the original copy of this invoice?—A. I think so, sir, I can find it.

Q. Would it be too much to ask you—A. I'll bring it.

Mr. ROONEY. I now withdraw Commission's Exhibit No. 56. (The document heretofore marked "Commission's Exhibit 56" was withdrawn.)

Trial Examiner BAYLY. Any further questions of this witness:

Mr. AIKEN. Yes. When you come back, Mr. Dietrich, do you have any records from which you could tell how much you paid the Ruberoid Company on this invoice?

The WITNESS. I have the invoice itself.

Mr. AIKEN. Do you have any other record that shows how much money you paid them?

The WITNESS. I could get them together if you want.

Mr. AIKEN. Would you ascertain that fact before you come back?

The WITNESS. I will.

Mr. AIKEN. Thank you.

30 By Mr. ROONEY:

Q. I am showing you Commission's Exhibit 56 for Identification again. The net amount of \$114.25, does that refresh your recollection as to how much you paid them?—A. No; that's five years ago.

Q. Does that help you refresh your recollection?—A. Except with the discount, it would help the discount.

Q. But you don't know whether you paid that \$114.25 or \$125.20?—A. Not right offhand.

Q. Would you have any records to show how much you did pay on that particular invoice?—A. I can get them, I think I can.

Q. When you bring those records, will you also bring a copy of letter dated May 11, 1940 addressed to the Ruberoid Company, in which you called their attention to the failure to allow you six percent discount.

Trial Examiner BAYLY. Mr. Dietrich, along the lines and questions Mr. Aiken was asking you, in connection with your dealings with Ruberoid, you were what they called an Applicator?

The WITNESS. Applicator and dealer.

Trial Examiner BAYLY. And you were working in this general New Orleans area?

The WITNESS. Yes, sir.

Trial Examiner BAYLY. And trying to get business with others, of other Applicators?

The WITNESS. Not with them but for myself.

Trial Examiner BAYLY. You were trying to get it for yourself and they were trying to get it for themselves?

The WITNESS. Yes.

51 Trial Examiner BAYLY. How extensively did you operate down there?

The WITNESS. Did a good deal of work in the lower section of the city.

Trial Examiner BAYLY. Mostly in the city of New Orleans, Louisiana?

The WITNESS. Yes, sir.

Trial Examiner BAYLY. Any other questions?

By Mr. ROONEY:

Q. Under the present day conditions, has building picked up?—

A. Not in this line; I am out of it practically.

Q. Out of it practically now?—A. Yes. That discount helped to put me out.

Mr. ROONEY. That's all.

Trial Examiner ROONEY. Mr. Dietrich, you will be available Monday?

The WITNESS. Yes, sir.

By Mr. ROONEY:

Q. And you will bring those records?—A. Yes.

Mr. ROONEY. Then the witness is excused until Monday.

(Witness temporarily excused.)

52 CHARLES L. MODENBACH was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your name?—A. Charles L. Modenbach.

Q. Where do you live, Mr. Modenbach?—A. 1219 Antonine Street, New Orleans, Louisiana.

Q. What is your business?—A. I am a partner of Joseph Modenbach & Sons.

Q. And what type of business do you carry on?—A. Roofing and sheet metal.

Q. How long have you been in that business?—A. I continued from my father, he died in 1937, which he started in 1895.

Q. More or less brought up in that business.—A. Yes, sir.

Q. Will you tell us a little bit what your business consisted of and what type of work you do?—A. Repairing and reroofing buildings, sheet metal work in connection with the buildings.

Q. Did you at sometime purchase any materials from the Ruberoid Company?—A. I have, sir.

Q. And over how long a period of time?—A. I don't know; I think I started in '40 or '41.



Q. You started purchasing?—A. From Ruberoid Company.

Q. Now, in your roofing business, Mr. Modenbach, do you have any competitors here in New Orleans?—A. A few, sir.

Q. Who are they?—A. Brandin Slate Company is a big competitor. Mr. Albert Brandin is dead now; Hibonia Roofing Company, National Roofing Company, Taylor-Seidenbach, Inc.

Q. What discounts, if any, did you receive from the Ruberoid Company?—A. I received six percent and two percent for cash.

Q. Would you say that the competition in your business was keen?—A. Very keen.

Q. So an additional five-percent discount would have been advantageous to you in the competitive situation?—A. Every little bit will help.

Q. Were other roofers who were competing with you, to your knowledge receiving additional discounts to what you were receiving?—A. I don't know, sir.

Mr. ROONEY. I think you may cross examine.

Cross-examination by Mr. AIKEN:

Q. Would you state in a little more detail, Mr. Modenbach, the character of your business?—A. Roofing and sheet metal work.

Q. Well, what kinds of roofing?—A. Slate roofing, asbestos roofing, sir, I couldn't do anything with asbestos, prices were high.

Q. The major part of your business has always been slate roofing, has it not?—A. Slate; yes, sir.

Q. Your purchases of asphalt and asbestos roofing products were only occasional, were they not?—A. When I could get it. I have lost a lot of jobs though.

54 Trial Examiner BAYLY. Why did you lose these jobs? The WITNESS. I couldn't say, sir. I'd figure the job to try to make a profit. There's one job I took a chance on and I lost about \$35.00 on it; it was a new building.

Trial Examiner BAYLY. I didn't want to interrupt you, Mr. Aiken, you go ahead.

By Mr. AIKEN:

Q. I think at times you purchased products, asphalt and asbestos products that were not made by Ruberoid, did you not?—A. Yes, sir. Very seldom bought a new roof except if the owner wanted Johns-Manville roofing I bought it from Taylor-Seidenbach, the material.

Q. In other words, you didn't buy from Johns-Manville, you bought from their distributor?—A. Yes, sir; their distributor.

Q. I see.—A. I tried to sell Ruberoid where I could and, of course, naturally you want to give the customer what he wants.

Q. I don't suppose you kept any stock of these products on hand, just order them when you had an order, is that right?—

A. Sometimes I'd have a few bundles over, a square over, it wouldn't pay, you could get it in overnight at that time.

Mr. AIKEN. That's all.

Redirect examination by Mr. ROONEY:

Q. You said, I believe you mentioned a job you lost money on, is that right?—A. That's right, sir. One job particularly I lost on.

55 Q. I show you Commission's Exhibit No. 20.—A. Yes, sir.

Q. And that is invoice No. 9324?—A. Yes, sir.

Q. Was that material purchased for a particular job?—A. This top item was, \$143.64.

Q. Do you recall whether you bid on a job in which that material was used?—A. Yes, sir; it was in Lake View and my price was \$170.00 and I had other material to go with it. I had used the felt they had in stock and some ridge tiles.

Q. Did you make money on that job?—A. Lost \$35.00.

Q. You have a subpoena to appear here today, Mr. Modenbach?—A. I have, sir.

Q. From the time you received that subpoena until this morning, were you invited to a conference with any representatives of the Ruberoid Company or their counsel?—A. I spoke with the two gentlemen here.

Q. Where was that?—A. At my home.

Q. Did they come out to see you?—A. Yes.

Q. Did they ask you if you'd been subpoenaed here?—A. Yes, sir.

Q. Did they say how many witnesses they'd been to see?—A. No, sir.

Q. Did they stay long?—A. About an hour; I couldn't say, maybe a half hour.

Mr. ROONEY. I think that's all.

Re-cross-examination by Mr. AIKEN:

Q. Just one other question. I think you said you bought the Johns-Manville products from Taylor-Seidenbach?—A. Taylor-Seidenbach was the distributor.

56 Q. He was also an Applicator, wasn't he?—A. Yes.

Q. On a roofing job he was a competitor?—A. Yes, sir.

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FERNAND JOSEPH VILLARS, Sr., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Would you give us your full name, please, sir.—A. Fernand Joseph Villars, Sr.

Q. And you live where?—A. 41 Metairie Heights, Jefferson Parish.

Q. New Orleans?—A. They think it's New Orleans; we don't look at it that way yet.

Q. What is your business?—A. Roofing contractors.

Q. What is the firm name?—A. F. J. Villars & Sons.

Q. And your place of business is where?—A. 609 Metairie Road.

Q. New Orleans?—A. New Orleans.

Q. We have to say New Orleans because of the record. When it gets up to Washington, the street address doesn't mean anything.—A. That's okey.

Q. And what is the nature of your business?—A. Roofing and siding contractors.

Q. Now, in your roofing business, do you have other competitors in New Orleans?—A. Oh, yes; have quite a few.

Q. Would you name some of them?—A. Brandin Slate Company, Hibernia Sheet Metal Works, National Roofing Company, Olympia Roofing Company, Crescent Materials—well, they're wholesalers, really not competitors, they don't put on roofs—and, well, Modenbach is a competitor in a way, mostly slates though, and Mr. Dietrich, I believe, but I very seldom come in competition with him.

Q. You purchased materials from the Ruberoid Company?—A. Yes, sir.

Q. And for how long?—A. It's been about seven or eight years, nine years, something like that.

Q. What discounts do you get?—A. Six and five.

Q. You are one of the favored boys?—A. Not that I know of; I didn't think I was one of them.

Q. You don't know anybody who got any better than that?—A. I don't.

Q. And you are solely a roofing Applicator?—A. That's correct.

Q. You don't sell at retail?—A. No, we don't get enough to sell.

Mr. ROONEY. That's all.

Cross-examination by Mr. AIKEN:

Q. When you say your discounts are six and five, Mr. Villars, what product are you talking about, asbestos?—A. Asbestos shingles and siding; not on the felts.

Q. Is that the present discount?—A. A privilege?

Q. Is the six and five the discount you are getting now?—A. No; it does not come on the invoice at all. We pay a straight price for it. You may have some of the invoices.

Q. That wasn't quite my question. Is six and five the discount you are getting on asbestos shingles now?—A. No; it is not.  
58 There's really no discount outside of the two percent cash discount within ten days.

Q. What are your discounts? What discounts are you getting on asbestos shingles now?—A. None, outside of the two percent.

Q. You principally apply asbestos, do you not?—A. And siding likewise.

Q. Asbestos shingles?—A. Yes.

Q. You never applied much asphalt?—A. Once in a while we have a built-up roof.

Q. But that part of the business is comparatively small, compared to your asbestos part of the business?—A. That's right.

Q. You do use some asphalt products in connection with built-up roofs and applying your asbestos products?—A. That's correct.

Q. Sort of an accessory?—A. Necessary.

Q. You use Ruberoid products exclusively, do you not?—A. We do.

Q. And you have for several years?—A. That's right.

Q. You maintain a warehouse, do you not?—A. We do.

Q. And you keep Ruberoid products in stock?—A. That's right.

Q. You, I think, in times past, have probably sold a small amount of goods at retail, have you not, that is, just right out of your store?—A. At times, when we had it to sell but what we get now is we have more contracts than we can get roofing for.

Q. In other words, you don't sell at retail now because you don't get the stuff to sell, is that correct?—A. That's correct; yes, sir.

Mr. AIKEN. That's all.

59 Redirect examination by Mr. ROONEY:

Q. How much of a retail business did you ever do?—A.

Well, not much; very little.

Q. And you weren't doing any retail business back in 1942, were you?—A. Well, as I say, very little.

Q. If any?—A. That's correct.

Q. Did you say you don't get any discounts now?—A. No discounts on the invoices at all.

Q. None on the invoices?—A. None known; no understanding as to any discount. We pay the regular straight prices.



Q. And you don't get any discounts at all?—A. None.

Q. None come on the invoices?—A. No.

Q. Mr. Hall doesn't come around and give you any?—A. No, sir.

EDWARD C. CHASSANIOL, Jr., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your full name?—A. Edward C. Chassaniol, Jr.

Q. Where do you reside?—A. 1708 Erato Street.

Q. In New Orleans?—A. New Orleans.

Q. And what is your business?—A. Roofing contractor, sheet metal work, siding.

Q. How long have you been in business?—A. Ten years.

Q. What does your business consist of mostly?—A. Roofing, built up roofing, asbestos shingles, siding.

Q. Do you have competitors in that business in New Orleans?—A. Yes, sir; I hope so.

Q. Name some of them.—A. National Roofing Company, Braffdin Slate Company, Villars & Sons, Olympia Roofing Company.

Q. Have you purchased material from the Ruberoid Company?—A. We have occasionally; yes, sir.

Q. I show you now Commission's Exhibits for Identification 28, 30, and 36 and ask you if you can tell us what they are, Mr. Chassaniol?

Trial Examiner BAYLY. Just a minute, that 30 is not in evidence.

Mr. ROONEY. None of these are; I said for identification.

A. I'd have to check, that is, I don't recall this. I'd have to check my records, we probably got some of that—probably all of it but I can't recall.

Q. Now, do you operate as an Applicator exclusively?—A. Yes, sir.

Q. Let me ask you one thing from these exhibits, Mr. Chassaniol, showing you Commission's Exhibits 28, 30, and 36 again and ask you to look at those to help you refresh your recollection as to the discount you received from the Ruberoid Company.—A.

Those six percents are probably all right. We have gotten a lot of stuff through mixed cars, ordered two or three hundred rolls of felt and billed through the Crescent Materials for that stuff at two percent ten days.

Q. That's the only discount you got?—A. On that stuff, yes, sir.

Q. In your business as a roofing Applicator, is the competition keen?—A. Yes, sir; it is.

Q. Would discounts additional to the two percent that you spoke of and the six percent that appear on the exhibits be advantageous to you in figuring the job?—A. No, sir.

Q. Why not?—A. Our competition—we figure we have a union shop and we can't bid with an open shop bid, you see. Our labor costs us more money, insurance costs us more, competition just isn't fair against the open shops.

Q. If you got an additional five percent, it wouldn't help you?—A. In figuring against an open shop; no, sir.

Q. Would it against a nonopen shop?—A. Yes, sir; it would.

Q. Are you still getting material from the Ruberoid Company?—A. When I can.

Q. You mean you order from them, you handle their material exclusively?—A. Yes, sir.

Q. And you have tried to buy it direct from them?—A. I have, yes, sir.

Q. And you have been unable to?—A. That's correct.

Q. Now, are these competitors of yours that you mentioned, are they able to get material?—A. I understand they can get it.

Q. And such material of the Ruberoid Company that you get you have to get through somebody else?—A. Yes, sir.

62 Q. You can't buy it directly?—A. No, sir. They have shipped us some stuff in here occasionally but it's delivered in here in split cars and somebody gets some of it and billed to us through Crescent Materials.

Q. Crescent Material is a wholesaler?—A. That's correct.

Q. The others, Brandin Slate, National Roofing?—A. They are Applicators.

Q. So far as you know, they have materials?—A. They seem to put it on; I notice a lot of jobs being put on by National. They get the material; I don't know where they get it from.

Mr. ROONEY. Your witness.

Mr. AIKEN. I don't think I have any questions.

Trial Examiner BAYLY. Why can't you get materials?

The WITNESS. I don't know. They claim they can't ship me any, there's none available and I see a lot of roofs going on and I know Crescent Materials material being used on it.

Trial Examiner BAYLY. Any further questions?

By Mr. ROONEY:

Q. When you say Crescent Material, you mean Ruberoid?—A. Yes; I beg your pardon.

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63 CARL O. LYLE, Jr., was thereupon called as a witness for the Commission and having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your full name, please?—A. Carl O. Lyle, Jr.

Q. And where do you reside?—A. 5760 General Diaz.

Q. That is New Orleans?—A. Yes.

Q. What is your business?—A. Wholesale roofing and building specialties.

Q. How long have you been in that business?—A. Since 1928.

Q. Do you handle products of the Ruberoid Company?—A. Yes, sir.

Q. For how long?—A. Ever since I have been in business and before that time too.

Q. You do exclusively a wholesale business?—A. Yes, sir.

Q. What discounts do you receive from the Ruberoid Company?—A. Well, we got six and five on asbestos material and five and five on composition material.

Q. When you say that you mean the carload list price less six and five?—A. Yes, sir.

Q. Now, did you at any time receive any additional discounts than those that you mentioned?—A. No, sir.

Q. Didn't you at one time receive seven and a half percent?—

A. The discounts have always changed from time to time, I don't remember what discounts; there's always been a different discount applying to the roofing business. I have been in it all my life practically—since I was 14 or 15 years old, 16 and I don't remember when those other discounts were in effect.

Mr. ROONEY. I would like to have this exhibit marked for identification, "Commission's Exhibit 57."

(The paper referred to was marked "Commission's Exhibit 57" for Identification.)

Q. I show you Commission's Exhibit 57 for Identification and ask you if you can tell me what that document is?—A. I'd have to have a price sheet:

Q. I show you now several invoices and ask you if they help to refresh your recollection as to what Exhibit 57 is.—A. I don't know what this is unless they forgot to put some discount on an invoice. I'd have to get the records out or look back and see what the cost was, probably something we may have written them about that they failed to put it on the invoice.

Q. Let me ask you if this refreshes your recollection. Is that amount represented on Commission's Exhibit No. 57 for Identification?

fication, does that indicate an additional two and half percent discount for merchandise?—A. I just simply can't remember because like I say they changed discounts so much; looks like every year they used to change the discount some way. I couldn't tell you unless I figured it out.

Mr. AIKEN. If you let me look at it, maybe we can stipulate as to what it is.

(Commission's Exhibit 57 for Identification was submitted to Mr. Aiken for examination.)

65 Mr. AIKEN. May we go off the record?

Trial Examiner BAYLY. Off the record.

(Discussion off the record).

Trial Examiner BAYLY. On the record.

Mr. AIKEN. We would be willing to stipulate, I think that Commission's Exhibit 57 is a credit memorandum issued by the Ruberoid Company to Crescent Materials Service, New Orleans, Louisiana, dated February 28, 1941, and that the credit memorandum reflected a discount allowed Crescent Materials Service on "A" products, so-called, which is the asphalt group of products. We will also stipulate that this discount was on purchases of asphalt products during the month of February 1940.

Trial Examiner BAYLY. Amounting to what?

Mr. AIKEN. The amount is \$48.25.

Trial Examiner BAYLY. In percentage what is it?

Mr. ROONEY. I believe—and that's what I was trying to determine through this witness—that it's two and a half percent additional—that Mr. O'Leary mentioned on the stand yesterday. There was a period of time some wholesalers got seven and a half percent.

Mr. AIKEN. I think this credit memorandum represents two and a half percent of his purchases during that month.

Mr. ROONEY. In addition to the five percent previously given?

Mr. AIKEN. In addition to the discount shown on the invoices themselves.

66 Trial Examiner BAYLY. Is that satisfactory?

Mr. ROONEY. That's satisfactory.

The WITNESS. They have different groups, A, B, C, D, that these things come in.

Mr. ROONEY. I'd like to offer Commission's Exhibit 57 in evidence.

Trial Examiner BAYLY. Without objection, Commission's Exhibit 57 may be received.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 57," was received in evidence.)

Mr. ROONEY. I think that's all.



Mr. AIKEN. Before the witness leaves the stand, I want to be perfectly fair, frank and open about this. I think, as a matter of fact—

Trial Examiner BAYLY. Are you making an objection?

Mr. AIKEN. I make an admission in evidence that this credit memorandum was an error and that the amount should have been twice that much and that we later issued another credit memorandum for exactly the same amount covering the same purchases for the same reason, so that the total discount that he was allowed on "A" products—

Trial Examiner BAYLY. Was twice that shown in 57?

Mr. AIKEN. In addition to the discount shown on the invoice, was exactly twice the amount shown on Commission's Exhibit 57.

Trial Examiner BAYLY. That's very fair.

67 Mr. ROONEY. I appreciate that very much but I simply thought I would have this witness show what this statement was.

Mr. AIKEN. We are not trying to cover up a thing.

JULIAN J. LOEB was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Your full name, please.—A. Julian J. Loeb.

Q. Where do you reside?—A. 7904 Burke Street, New Orleans.

Q. What is your business?—A. The National Roofing & Siding Company.

Q. And that is located where?—A. 2631 South Clairborne Avenue, New Orleans.

Q. What business is the National Roofing Company in?—A. A roofing contractor and siding and a little sheet metal work.

Q. And when you say roofing contractor, do you mean roofing Applicator?—A. Yes, sir.

Q. The great amount of your work is done here in New Orleans?—A. Yes.

Q. Any outside of New Orleans?—A. Yes, sir; a little portion of it.

Q. Where do you do it?—A. Within a 75 mile radius of New Orleans; we do possibly three or four percent.

68 Q. In your roofing business, do you have other competitors in New Orleans?—A. Yes, sir.

Q. Would you tell us who they are?—A. Hibernia Roofing and Metal Works, Brandin Slate Company, Taylor-Seidenbach, Groesbeck-Clotworthy.

Q. And you have been buying your materials from the Ruberoid Company?—A. Yes, sir.

Q. For how long a time?—A. Since about ten years.

Q. Do you sell some of your material to other roofers?—A. Some; a small portion of it.

Q. The greater portion of your business is Applicator?—A. That's right.

Q. Would you say that the roofing business competition is rather keen in New Orleans?—A. Yes, sir.

Mr. ROONEY. Your witness, you may cross examine.

Cross-examination by Mr. AIKEN:

Q. You handled, before the war at least, handled Ruberoid products exclusively, didn't you?—A. Yes, sir.

Q. You maintain a warehouse, do you not?—A. Yes, sir; I do.

Q. You keep a substantial stock of materials on hand, do you not?—A. Yes, sir.

Q. And isn't it true that you have over the years endeavored to promote the use of Ruberoid products?—A. That's right, sir.

Mr. AIKEN. I think that's all.

69 Redirect examination by Mr. ROONEY:

Q. Just one question. Mr. Loeb, I believe you said the greater part of your business was as a roof Applicator, is that correct?—A. That's right.

Q. Would it be fair to say about ninety percent of your business would be as a roof Applicator?—A. Yes, sir.

Q. And to promote the commodities of Ruberoid among your customers who put on roofs?—A. It is to the public itself; we deal to the consumer.

Mr. ROONEY. Thank you; that's all.

Mr. AIKEN. That's all.

Trial Examiner BAYLY. Does counsel want this witness at any future time?

Mr. ROONEY. No.

Mr. AIKEN. No.

Trial Examiner BAYLY. You are excused then, Mr. Loeb. (Witness excused.)

Mr. ROONEY. Mr. Siben.

JOHN J. SIBEN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you give us your full name, please?—A. John J. Siben.

70 Q. And you reside where?—A. 4026 Clematis.

Q. Would you state for the record New Orleans. When we read the record in Washington, we don't know where you are, sir.—A. New Orleans.

Q. What is your business?—A. I am the owner of the Hibernia Roofing & Metal Works.

Q. And they are located where?—A. 2265 St. Claude Avenue, New Orleans.

Q. And how long have you been in business?—A. Thirty-one years.

Q. And what does your business consist of primarily?—A. Roofing, siding, sheet metal work.

Q. Do you operate principally as a roof Applicator?—A. Principally we are; yes, sir. When I mean principally, I mean the majority of our material is used in the application of roofs.

Q. By you as a roofer?—A. That's right.

Q. Do you have others in the New Orleans area who are competing with you in that?—A. I consider every roofer a competitor and I'll name you a few of the principal competitors like Brandin Slate Company, National Roofing Company, Taylor-Seidenbach, Groesbeck-Clotworthy.

Q. And you buy your materials from the Ruberoid Company?—A. Exclusively.

Q. How long have you been purchasing from them?—A. Well, I guess since I started in business.

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71 E. J. O'LEARY resumed the stand and testified further as follows:

Direct examination (continued) by Mr. ROONEY:

Q. Mr. O'Leary, I note that these price lists that you have produced are for Mobile.—A. Yes, sir.

Q. Are there price lists for other areas?—A. Yes, sir.

Q. And would you be familiar with the price lists in the other areas?—A. With our printed price schedules I am in a general sense; yes, sir.

Q. Do you know what other areas have price lists than Mobile?—A. Our Millis area; our New York City area; Erie, Pennsylvania; Chicago, Illinois; Minneapolis, Minnesota; Baltimore, Maryland; Mobile, Alabama; and a price list issued for the State of Texas.

Q. Now, would those price lists be available at your main office in New York?—A. Yes, sir.

Q. But apparently they are not identified?—A. Well, because, largely because a greater variety of products may be made at one plant than is made at another plant. Those bring about to the largest degree the variance in the actual price schedule.

Q. In other words, the same product would be the same price in all areas?—A. The same published price, that is substantially so; yes, sir.

Q. I am trying to be accurate. Would there be a variation in the price?—A. Speaking for today, no. In other words, our price lists that are published for the particular branches that I speak of reflect exactly the same prices that are published for the Mobile branch on the products that the Mobile branch manufactures.

Q. Would your price in Mobile be the same price for a product manufactured in Millis, for example?—A. Yes.

Q. And the same price is published in the Millis list?—A. Yes, sir.

Q. Has that been true right along or is that just at the present time?—A. That has been—I am sorry that I have to use the word generally. On the front of our price lists we have indicated that under some conditions we might publish special prices for a specific locale in order to meet competition in a location and those published prices are available to the interested parties. I think that is printed on the front of price list 159, if I am not mistaken, Mr. Rooney.

Q. The reference you make is that "We may at times publish different prices for different localities according to competitive conditions. Upon request, we will furnish our published prices for any locality to anyone interested."—A. Yes, sir.

Q. So it is possible that a price list for some other area might be different than the Mobile price—the published price?—A. That would be a supplement issued to the regular published schedule for perhaps a short period of time.

Q. We might go back a little bit, Mr. O'Leary. There was some testimony this morning that might result in some confusion on these invoices and I notice in all the invoices I referred to, particularly to Commission's Exhibits 1 through 55, that there is mention of a 20 percent—or rather, I will put it this way—less 20.—

A. Yes, sir.

73 Q. Would you explain that for the record?—A. Yes.

Our published prices, published list prices on asbestos cement shingles are subject to a discount in carload or ten ton quantities of twenty and six percent.

Q. So that when there appears on the invoice—we take here Commission's Exhibit 54, for example.—A. Yes, sir.

Q. It's for 25 squares Snow White 12 inch Colonial siding. Then beneath that is 7.35, that's, seven dollars and thirty-five cents?—A. Yes, sir.

Q. List price?—A. Less twenty percent.

Q. Then carried over in the unit price would be \$5.88.—A. Yes, sir; that reflects twenty percent discount from that \$7.35 price.

Q. In addition to that six percent asbestos distributor's commission?—A. That's right.



Q. And when we were speaking during this testimony of six percent and five percent, it was in addition to that twenty percent?—A. Yes, sir.

Mr. ROONEY. I think that's all, Mr. O'Leary.

Trial Examiner BAYLY. Does each of these invoices show the net amount which the customer and consumer pays for the product?

The WITNESS. If correctly prepared by the billing department and presumably these invoices have been correctly prepared, the price shown at the bottom of the invoice or the resulting total price, is the net price paid by the customer in the case of all people where we have not extended an additional discount which may be handled by credit memorandum form as has been shown by previous evidence submitted. All of our sales are subject to a two percent cash discount on the 10th of the following month. If they pay promptly they get a discount.

Trial Examiner BAYLY. If they pay on the 10th of the following month they get that?

The WITNESS. Yes, sir.

Mr. ROONEY. That's available to everyone?

The WITNESS. Oh, yes; yes, sir.

Trial Examiner BAYLY. Now, Mr. Rooney, for my information perhaps more than anybody else's, just briefly relate these price lists to the pleadings and translate them briefly in terms of what you are claiming for them.

Mr. AIKEN. Do you want to do that on the record?

Mr. ROONEY. They speak for themselves showing terms and conditions of sales. These price lists as offered here show up to—

Trial Examiner BAYLY. We are talking about Exhibits 58 to 63 and 63-A inclusive.

Mr. ROONEY. That's right. Exhibit 58 are prices listed September 20, 1939, up to July 12, 1941, containing no terms and conditions of sale. Price List No. 151, or Commission's Exhibits 59 and 59-A, show terms and conditions of sale. From July 12, 1941, to September 2, 1941, when the next price list was published and which is Commission's Exhibit No. 60, shows terms and conditions of sale which vary from the terms and conditions of sale as set forth in Commission's Exhibits 59 and 59-A. From September 2, 1941 to December 12, 1941, at which time a new price list was issued, which is identified as Commission's Exhibit 61, the terms and conditions of sale vary from those shown in Commission's Exhibit 60. From December 12, 1941, to January 31, 1942, at which time a new price list was published, and

identified as Commission's Exhibit 62, the terms and conditions of sale vary from those set forth in Commission's Exhibit 61.

From January 31, 1942, to January 21, 1943, at which time a new price list was issued, which is identified as Commission's Exhibits 63 and 63-A, the terms and conditions of sale vary from those set forth in Commission's Exhibit 62. That's the purpose of these price lists.

Trial Examiner BAYLY. Translating this over-all picture, what are you claiming for this variation of price?

Mr. ROONEY. I am not claiming anything other than that the Respondent shows it published the terms and conditions of sale at which these discounts are allowed. Now here they are.

\* \* \* \* \*

CHARLES H. DIETRICH resumed the stand and testified further as follows:

Direct examination (continued) by Mr. ROONEY:

Q. Mr. Dietrich, do you now have with you an original invoice from the Ruberoid Company, No. 1649?—A. Yes, sir.

76 Q. May I see it, please?—A. Yes, sir.

Q. Would you take it? Do you need this any longer, Mr. Dietrich?—A. No; I can do without it. In relation to—

Q. We'll go into that further but do you need this any further?—A. No, sir.

Mr. ROONEY. I'd like to have it marked.

Trial Examiner BAYLY. That was 56 this morning, already identified, wasn't it?

Mr. ROONEY. 56 was identified as a copy and now is identified as the original.

Mr. AIKEN. I suggest it be marked 56, that will relieve the confusion. It's the same thing.

(The paper referred to was marked "Commission's Exhibit 56" for Identification.)

Trial Examiner BAYLY. It's identified, is that right?

Mr. ROONEY. Identified as the original invoice.

Trial Examiner BAYLY. And you are offering that in evidence?

Mr. ROONEY. Yes; if Your Honor please.

Trial Examiner BAYLY. Without objection, Commission's Exhibit 56 may be received in evidence.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 56," was received in evidence.)

By Mr. ROONEY:

Q. I will ask you, Mr. Dietrich, if the notations on this Exhibit 56 which appear in pen were put on by you?—A. It seems this was put in lead pencil and gone over with pen.

77 Q. Did you do that?—A. Yes, sir; those are my figures.

Q. As submitted by the Ruberoid Company, there was no discount of six percent allowed as you received the invoice?—

A. I made a deduction according to that letter.

Q. It wasn't on the invoice when you received it?—A. No; I don't think so.

Q. You figured it out in pencil?—A. Yes, sir.

Q. So that the amount you paid on this invoice was \$114.25?—

A. Yes.

Q. That is shown on Commission's Exhibit 56?—A. Yes, sir.

Q. The amount requested by the invoice was \$125.20?—A. Yes, sir.

Q. And you took off two percent on \$136.80?—A. Yes, sir.

Q. And you took off an additional six percent on the \$136.80?—

A. Yes, sir.

Q. Now, did you write a letter to the company about their failure to give that six percent?—A. I wouldn't say it was the failure of the company. I'd say I wrote the company telling them that I had made the deduction on two percent for cash and taken six percent for distributor's commission.

Q. Is that a copy of the letter?—A. Yes, sir.

Mr. ROONEY. I'd like to have it identified.

(The letter referred to was marked "Commission's Exhibit 64" for identification.)

Mr. ROONEY. I'd like to offer in evidence Commission's Exhibit 64 which is a copy of a letter dated May 11, 1940, written by the witness, Mr. Dietrich, to the Ruberoid Company, Mobile, Alabama.

78 Trial Examiner BAYLY. Without objection, it may be received.

(The letter referred to, heretofore marked for identification "Commission's Exhibit 64," was received in evidence.)

Mr. ROONEY. That's all, Mr. Dietrich. Thank you very much.

Trial Examiner BAYLY. Off the record.

(Discussion off the record.)

Trial Examiner BAYLY. On the record.

By Mr. ROONEY:

Q. Now, Mr. Dietrich, did you—I believe you testified that you made purchases of other products than those which are identified in Commission's Exhibit 56?—A. Yes, sir.

Q. Do you happen to have the invoices of any other purchases you made?—A. I have an invoice here, No. 2623, dated June 14, 1940, the first item, blue-black 16-inch hexagonal shingles I was charged \$6.52 a square and I noted here in lead pencil at that time about six years ago the price should have been \$6.32. The

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third item of 50 squares of jade green 16 inch hexagonal shingles I was charged \$6.72 a square and I have a lead pencil notation of \$6.52. That would make a difference of \$10.00 on each of those two items or \$20.00 in all. I also have a lead pencil memorandum up here

"I should get a net price of \$5.50; I should sell at \$6.50; gross profit is only 37¢ a square."

79 Q. What was the total amount of the invoice?—A. \$1,163.05, less discount \$23.05.

Q. That discount is two percent cash, is it not?—A. Yes, sir.

Mr. ROONEY. I would like to have this numbered for identification.

(The paper referred to was marked "Commission's Exhibit 65" for Identification.)

Mr. ROONEY. I would like to offer Commission's Exhibit 65 in evidence, which is invoice No. 2623 dated June 14, 1940, for merchandise sold to the witness, Charles H. Dietrich.

Trial Examiner BAYLY. Without objection it may be received.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 65," was received in evidence.)

Mr. ROONEY. That's all.

Mr. AIKEN. In connection with this witness' last testimony, I should like to introduce another price list which I will have marked Respondent's Exhibit No. 1.

(The price list referred to was marked "Respondent's Exhibit 1" for Identification.)

Mr. AIKEN. I'd like to offer in evidence Exhibit No. 1 which is the price list of the Ruberoid Company No. 40-A, dated January 24, 1940.

Trial Examiner BAYLY. Without objection, it may be received.

80 (The price list referred to, heretofore marked for identification "Respondent's Exhibit 1," was received in evidence.)

By Mr. ROONEY:

Q. Now, Mr. Dietrich, you made mention of the unit \$6.52 which should have been \$6.32, you made a pencil notation?—A. Yes.

Q. And the unit price of \$6.72 which should have been \$6.52?—A. Yes.

Q. What do you have at the heading of that, in pencil?—A. Old price.

Q. Do you mean that you offered them at the old prices or what?—A. No; I wanted to get a reduction according to the old



prices and here's a notation July 8, 1939, of the same old prices \$6.32 and \$6.52.

Q. You are comparing them with the old prices on your invoice?—A. With July 8, 1939, about 11 months previous to that.

Q. The price at that time was cheaper?—A. Yes.

Q. You don't mean then that the price of \$6.52 and \$6.72 wasn't the list price at the time you paid them?—A. It might have been, but I judged it by my old price, 11 months previously, which was \$6.32 and \$6.72, difference of twenty cents a square.

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Trial Examiner BAILEY. Mr. Reporter, show that this hearing is now resumed at 10:00 a. m., Monday, March 11.

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81 EUGENE J. LILLIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you state your full name, please, sir?—A. Eugene J. Lillis.

Q. And you reside where?—A. Where do I reside?

Q. Yes.—A. 1626 South Jeff Davis Parkway.

Q. New Orleans?—A. Yes.

Q. And what is your occupation, Mr. Lillis?—A. I am engaged in the roofing business.

Q. And you are President of the Brandin Slate Company?—A. I am the owner.

Q. And the place of business is located where, Mr. Lillis?—A. 1021 North Rampart, New Orleans.

Q. Would you give us a general outline of your business: what it consists of, the type of business it is?—A. I am in the roofing and siding business.

Q. Is your business confined to the New Orleans area?—A. At the present time; yes.

Q. At any other time, did you do business outside of New Orleans?—A. Before the war.

Q. Where?—A. All over the state.

Q. Did you do any business outside the state?—A. You mean, then?

Q. Yes.—A. Oh, I might have. I couldn't answer that, now.

82 Q. Any business you did outside the state would be either in Mississippi or Texas, or Alabama?—A. No. I might have done a few jobs on the coast, in Mississippi.

Q. Now, when you say that you are engaged in the roofing business, do you mean as a roofing contractor, or as an applicator?—A. I sell and apply.

Q. I beg your pardon.—A. I sell and apply.

Q. Sell and apply?—A. Yes.

Q. Now, do you have any other competitors in that business, that you know of?—A. Lots of them.

Q. Would you name some of them?—A. Well, I would say Taylor-Seidenbach—do you want some more names?

Q. Please.—A. Hibernia Roofing Company; National; Greesbeck-Clotworthy. Almost anybody in the city, in the roofing business, is a competitor of mine.

Q. Is competition pretty keen in that business?—A. It's fair. Mr. ROONEY. Your witness.

Cross-examination by Mr. AIKEN:

Q. As far as your roofing products you use and sell are concerned, you handle Ruberoid products exclusively, do you not?—A. That is correct.

Q. And you maintain a warehouse, do you?—A. At that time—in '41, and back, you are speaking about?

Q. No; I am speaking about now.—A. Oh, at the present time I have a warehouse here, sure.

Q. And you have had a warehouse for several years?—A. Yes.

Before the war I had one in Lafayette and also one here.

83 Q. Lafayette where?—A. Louisiana.

Q. I see. And you maintain a stock of Ruberoid products?—A. At all times.

Q. And you endeavor to promote the sale and use of them, do you? Do you endeavor to promote the sale and use of Ruberoid products?—A. Oh, yes, I do; I have salesmen out doing that.

Q. Now, you say you sell and apply. Do you sell to other dealers, or to dealers in roofing products?—A. I do.

Mr. AIKEN. I think that's all.

Redirect examination by Mr. ROONEY:

Q. Mr. Lillis, what percentage of your business is as an applicator as against the retail?—A. You are speaking about the present time, or back?

Q. Back, and at the present time.—A. Well, I would say that before '41, I'd say I sold pretty near half of my merchandise. And, right now, I apply most of it.

Q. Apply most of it now?—A. Yes.

Q. So, when you say you promote the use of Ruberoid products you mean you try to interest the public in using Ruberoid material?—A. Oh, yes, sir. When I first took the Ruberoid line on

down here; I had a tough battle. Everybody thought that the asbestos shingle—when you said Ruberoid they thought it was a rubber or composition shingle. I had all kinds of competition trying to put the Ruberoid account over.

Q. When you sought business to put on roofs, you tried to convince them Ruberoid was the thing to put on?—A. No. You see, when I first took the Ruberoid line on down  
84 here, the asbestos shingle was the hardest thing to sell, the Ruberoid asbestos shingle, here in town, because they had another brand that they called Eterna.

Q. Let me interrupt you a minute. Did you understand my question?

Trial Examiner BAYLY. Suppose the Reporter read that question of Mr. Rooney's to the witness.

(The reporter read the question as follows:

"Q. When you sought business to put on roofs, you tried to convince them Ruberoid was the thing to put on?"

The WITNESS. Yes; I tried. Sure.

By Mr. ROONEY:

Q. I mean, to people that would want to use that material on their building?—A. Yes. People called us up for an estimate on a roof, and we went out and figured the job, and our salesmen would have to go there with a sample of the asbestos shingle and convince the customer that that was as good a product as they could possibly buy.

Mr. ROONEY. That is all, Mr. Lillis.

Oh, only one other question: I understand that you waive any compensation for appearing as a witness?

The WITNESS. Yes.

Mr. AIKEN. That is all.

Trial Examiner BAYLY. You are excused, Mr. Lillis.

(Witness excused.)

85 DAVID A. USNER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Your full name, please?—A. David A. Usner.

Q. Where do you reside?—A. 2903 Constance.

Q. New Orleans?—A. New Orleans; yes, sir.

Q. Now, in 1941, were you operating the business of Usner Sheet Metal Works?—A. That's right, sir.

Q. At 2845 Magazine Street, New Orleans?—A. That's right.

Q. And would you tell us the type of business that you had?—A. We were applicators, mostly, and some roofing. It seems that we would take a roofing job to get the sheet metal job.

Q. When you speak of the sheet roofing job, you mean asbestos?—A. Asbestos, asphalt, and slate.

Q. And then, I believe you went into the service, did you?—

A. I went into the service about—I'd say about April or May 1942.

Q. And when you went into the service you closed up your business?—A. My business has been closed.

Q. Now, back at that time, and the years prior to that, was the competition rather keen in the roofing-business in New Orleans?—

A. It had been; yes.

Q. Who was some of your competitors?—A. National Roofing Company; Brandin Slate Company; Holzer Sheet Metal Works.

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86 HERBERT J. HONECKER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. For the record, would you state your full name, please?—

A. Herbert J. Honecker.

Q. And your residence?—A. I live at 6818 Milne Street, New Orleans.

Q. And you are an Attorney Examiner of the Federal Trade Commission?—A. I am.

Q. And you are attached to the New Orleans office of the Federal Trade Commission?—A. Yes, sir.

Q. Mr. Honecker, did you, on February 18, 1942, interview a Frank A. Doerr [spelling] D-o-e-r-r, who is the owner of the American Slate and Roofing Supply Company, located at 326 South Diamond Street, New Orleans?—A. I interviewed him on that date, as nearly as I can recall.

Q. And was that at his place of business?—A. That was at his place of business at the time.

Q. When you called at his place of business, from your own observation, could tell us what type of business it was?—A. The place of business was in a large warehouse, one corner of which was set off for an office, and as I recall it, there was roofing—

Q. May I interrupt you: I meant the general type of business—

A. Oh, yes. It was obviously a roofing establishment.

87 Q. A roofing business?—A. Yes.

Q. As a result of—

Mr. ROONEY. Strike that.

By Mr. ROONEY:

Q. Did you some time later, again, go to interview Mr. Doerr?—

A. I attempted to.



Q. Were you able to locate him?—A. I was unable to locate him, either at his home or at his place of business.

Q. And you have been unable to locate him since that time?—

A. I have seen nothing of him since.

Mr. ROONEY. Your witness.

Mr. AIKEN. No cross-examination.

Mr. ROONEY. That is all.

(Witness excused.)

Mr. ROONEY. Mr. Examiner, Mr. Doerr has now come in, in response to the subpoena issued, and I would like at this time to place him on the stand for examination.

Trial Examiner BAYLY. Very well. Call your witness.

Mr. ROONEY. Mr. Examiner, I don't want the closing now to contain the remarks I previously made, that the witness is not here.

Trial Examiner BAYLY. It will be obvious that he is in here and has testified.

88 FRANK A. DOERR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you state your full name, please?—A. Frank A. Doerr.

Q. Where do you reside?—A. 2020 Broadway.

Q. New Orleans?—A. Yes, sir; New Orleans.

Q. What is your business?—A. Well, at present I am in the—that is, I am working for a roofing and installation material and dealer and contractor.

Q. Were you, at any time, in business for yourself, Mr. Doerr?—

A. Yes; I was in business for a period, from September 1938 up until February 1942. At first, for a period of about eight months, as President of Jordy Bros. Roofing, Inc., and after that, until February 1942, as owner of the American Slate and Roofing Supply Company, 326 South Diamond Street, New Orleans.

Q. Have you been connected with the roofing business for some time, Mr. Doerr?—A. Full life.

Q. From 1938, Mr. Doerr, until 1942, would you give us a general outline of the type of business you were engaged in, and what you did?—A. Well, starting in September 1938 for a period of about eight months, I was managing and running the Jordy Bros. Roofing, Inc., and we retailed roofing materials of all kinds, asbestos shingles, rolled roofings, and everything in the roofing line.

Q. Now, would you be designated as a roof applicator?—A. And also, we—also, we operated as applicators, in connection with the selling of material.

89 Q. Yes.—A. And our selling of materials consisted of selling to dealers, lumber dealers, and other roofing companies around the city. And we did work, not only in New Orleans, but as far off as Florida.

Q. Did you have other competitors at that time, too?—A. The competition at that particular time, during this entire period of about four years, was extremely strong, due to labor conditions and the fact that there were so many companies entering into it—new companies entering into the business, here.

Q. Competition was keen?—A. Very keen.

Q. You say you went out of business in 1942?—A. 1942, on account of the business being unprofitable for some time, and I didn't see any purpose in continuing in an unprofitable business.

Q. When you say unprofitable, do you mean competition was keen or—A. Well, not that the competition was so active, but the fact that you met up with lower prices, as a general thing, that you couldn't meet. And you were limited in your scope of selling on account of having to find people that were not good shoppers to sell to, because anybody that was a good shopper would find a lower price, as a general thing.

Q. So far as you know, were prices on—

Mr. ROONEY. Oh, strike that.

By Mr. ROONEY:

Q. Did you purchase material from the Ruberoid Company?—

A. Yes; I purchased from the Ruberoid Company, through their local representative, John Hall.

90 Q. Who was their salesman?—A. John Hall was their salesman. He took the orders and he either mailed them in or phoned them in to his factory, in Mobile.

Q. Now, Mr. Doerr, so far as you know, or if you do know, were any of your competitors purchasing material from Ruberoid at more favorable prices than you were?—A. Well, I didn't actually see the invoices, but I have positive evidence—that is positive reason, in that—

Mr. AIKEN. Now, Your Honor, if this man is going to speculate, I object. The prices at which we sold these people are all in evidence. There is no reason to get his speculation in.

The WITNESS. Wait a minute—

Trial Examiner BAYLY: Now, you wait a minute.

Mr. ROONEY. Just a minute.

Trial Examiner BAYLY. Read Mr. Aiken's objection, please.

(The reporter read the objection as follows:

"Now, Your Honor, if this man is going to speculate, I object. The prices at which we sold these people are all in evidence. There is no reason to get his speculation in.")

The WITNESS. All right. I will—

Mr. ROONEY. Now, just wait a minute.

Trial Examiner BAYLY. Just wait until you are told to go on.

What do you say to that, Mr. Rooney?

Mr. ROONEY. I have no objection to your ruling.

Trial Examiner BAYLY. The Trial Examiner is going to  
91 permit the witness to answer the question, with the privilege  
appropriate time, to clear that up.

(To the witness.) You may answer the question.

Now, Mr. Reporter, read the question.

(The reporter read the question as follows:

"Q. Now, Mr. Doerr, so far as you know, or if you know, were  
any of you competitors purchasing material from Ruberoid at  
more favorable prices than you were?")

The WITNESS. Let me answer it this way, and then you can—

Trial Examiner BAYLY. You answer it the best way you can.  
Then, if you want to make an explanation of your answer, you  
may do so.

The WITNESS. I haven't seen any competitor's invoices who may  
have bought from Ruberoid Company, but I do know this: that at  
present, the prices of standard materials like Ruberoid others of  
the kind are, for example, in the case of Hexicon, 16 by 16 blue-  
black shingles, \$5.75 per square, where I was charged, all during  
the years 1941 and 1940, \$6.12 per square on this particular item.  
Also, in the case of blue-black 16 by 16 Dutchlap shingles, the  
present price to the dealer is \$6.00 per square, whereas during the  
years of 1941 and '40—in 1940, I paid \$6.44 per square:

That will fix you up.

92 By Mr. ROONEY:

Q. Now— A. Now the prices—I will add to this: to the  
very best of my knowledge, the prices on nothing in the roofing  
line have decreased, but, on the other hand, if anything, they have  
all been subject to some increase, except possibly this particular  
item, but I am positive there was no decrease. That will fix  
you up.

Q. Now, do you remember any specific job that you didn't get  
because of the variance in price: that is, your price and the com-  
petitor's prices?—A. Numerous jobs. That was almost an every-  
day occurrence, those jobs—I can't recall offhand. It's natural  
in every business, even today. Every business loses jobs, daily, on  
account of price.

Q. If you had been able to purchase material from Ruberoid at  
the same prices as your competitors, would that have been to your  
advantage, in figuring?—A. Certainly. Because, by paying a  
higher price for materials as compared to a competitor, my scope

of doing business, or my—my scope of doing business was limited. For instance, I couldn't sell a lumber dealer or another roofer that would come to me to buy material on account of prices being too high. On many occasions you'd lose an applied job on the basis of even a few dollars.

Q. Would a few dollars mean the difference— A. Sometimes.

Q. Between getting the job and losing it?—A. Sometimes, one dollar makes a difference, where it's another reputable concern figuring—where it's another reputable concern figuring against you.

93 Q. I don't recall whether I asked you or not, but could you tell us who were some of your competitors when you were in business?—A. The principal competitor was Brandin Slate Company, on both dealer business and applied business, who did a business, exactly like mine. Then, also, The Crescent Material Service Company, who were supposed to be doing dealer business, but I am not quite so sure about that—that they did that.

Q. Any others?—A. National Roofing, who did a business exactly like mine, and then there were numerous other dealers, like myself, buying Ruberoid products, direct from Ruberoid Company.

Mr. ROONEY. I think you may inquire.

Cross-examination by Mr. AIKEN:

Q. Who do you work for now, Mr. Doerr?—A. Taylor-Seidenbach.

Mr. AIKEN. That is all.

Mr. ROONEY. That is all.

Trial Examiner BAYLY. Mr. Doerr, you claim you weren't getting as good prices as some of the other men in the same type of work. Is that right?

The WITNESS. I believe that. I am positive of it, although I can't—nobody handed me an invoice to show me, because, naturally, they wouldn't want to—they wouldn't want to give away their benefit, their advantage. They wouldn't want to tell their advantage.

Trial Examiner BAYLY. Do you know why you weren't as favored a buyer as others?

94 The WITNESS. No. I never—in fact, I was never told I wasn't as favored. I was always told, when the question came up, that I got exactly the same prices as everybody else. I was told that at least fifty times during the course of the four years.



Trial Examiner BAYLY. What was the general volume of your business? You were an applicator?

The WITNESS. Applicator and dealer.

Trial Examiner BAYLY. What was the general volume of your business?

The WITNESS. Well, it varied, and I'd just say, roughly, about a \$1,000 a month. Sometimes it would run a few thousand, and sometimes practically nothing.

Trial Examiner BAYLY. Did you have warehousing facilities?

The WITNESS. Yes, sir; warehousing and office, and all the facilities that a dealer, an applicator, would be required to have, and I covered, not alone New Orleans, but the State of Louisiana, all over the State of Louisiana, clear to Texas—clear to Florida. And, I have jobs to show it.

Mr. ROONEY. Did you buy car—oh, pardon me, Mr. Examiner. I thought you were through.

Trial Examiner BAYLY. That is all right.

The WITNESS. And, much of our business was secured on the open, competitive bids, such as the United States Coast Guard, the W. P. A. Procurement.

95 By Mr. ROONEY:

Q. Did you buy in carload lots?—A. I ordered in carload lots. Sometimes a carload would come in, as a whole, but as a rule, in most cases it came in as less carload—in truckload lots, rather. I was told I was—I was told by the representative, that it didn't make any difference, that the truckload price would be the same as a carload price.

\* \* \* \* \*

### Before Federal Trade Commission

#### *Trial Examiner's Recommended Decision*

June 28, 1948

#### I. PROCEEDINGS

On July 26, 1933, the Federal Trade Commission issued its complaint against The Ruberoid Company charging in substance price discrimination in the sale of roofing and insulating materials in violation of the Robinson-Patman Act.

Extensive hearings for the taking of testimony and receipt of documentary evidence were held, before Charles B. Bayly, Trial Examiner, in various parts of the United States. At the conclusion of the hearings the transcript and all documents pertaining to the proceedings were filed with the Federal Trade Com-

mission in Washington, D. C., and constitute the entire administrative record.

James I. Rooney appeared as counsel in support of the complaint, and William M. Aiken and Spencer Gordan (Covington, Burling, Rublee, Acheson & Shorb) appeared as counsel for the respondent.

Full opportunity was afforded the parties to present and defend their case, file briefs and make arguments. 96 Neither party desiring to offer further evidence and following conferences to simplify the issues, the record was formally closed on June 7, 1948. The Trial Examiner now makes his Report Upon The Evidence, Recommended Findings and Conclusions and Recommended Order, based upon the administrative record.

## II. PLEADINGS AND ISSUES

### A. The Complaint and Answer

The Federal Trade Commission, believing The Ruberoid Company, a corporation, was and had been violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, issued its complaint on July 26, 1933, charging in substance that:

Par. 1. Respondent is a New Jersey Corporation with its main office at 500 Fifth Avenue, New York City; it is and has been since June 19, 1936, engaged in processing, manufacturing, offering for sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products throughout the United States; is one of the largest manufacturers and distributors of the product in the United States; maintains and operates branch warehouses in various cities; sells its product directly to wholesalers, retailers, and "applicators" who are also known as building or roofing contractors and apply the product to buildings, charging the consumer both for the material and labor required.

(The answer of respondent to Paragraph 1 filed September 27, 1943, refers to the respondent as The Ruberoid Co.; denies violation of the law as charged but admits all other statements therein.)

97 Par. 2. Respondent sells and distributes its product in interstate commerce, some initially from the point of production to purchasers situated in other states in a continuous flow in commerce and also from its warehouses to the purchaser's thereof who thereupon resell and distribute it for use within the various states of the United States and the District of Columbia.

(Respondent's answer admits these statements.)

Par. 3. While conducting its business respondent, at all times, has been in substantial competition with other manufacturers of the product who for many years have been and are now likewise engaged in the production, sale and shipping of their product, in commerce, across state lines to buyers thereof located in various states of the United States; many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of the products, within the same several trade areas.

(Respondent's answer states that many of its customers are not competitively engaged at all times as charged in Paragraph 3.)

Par. 4. While operating as charged, since June 19, 1946, respondent has discriminated and continues to discriminate in price by selling different purchasers at higher prices than it sells products of like grade and quality to other customers competitively engaged in the resale of said products, within the same territory, with customers receiving the lower prices; grants all customers a cash discount of 2% if the invoice is paid within a specified time.

(The answer to Paragraph 4 denies any price discrimination; admits the cash discount as stated.)

98 Par. 5. This discrimination was through use of a trade discount schedule, selling some customers at higher prices than to others, in competition, goods of like grade and quality granting:

(a) a "distributor commission" ranging from 5% to 10% deducted from the invoice price and a "wholesale discount" of 5% from the invoice price. This latter discount went to favored customers and was in addition to the 5% to 10% discount granted the same customers;

(b) a "distributors commission" of 5% and in some cases 6% deducted from the invoice price and a "wholesale discount" of 6% off the invoice price which was in addition to the "distributor commission" of 5% and, in some instances, 6% was allowed to the same customers. Such commission and wholesaler discount were granted to some and withheld from other customers of respondent buying the product and in competition with each other.

(Respondent admits it grants wholesalers a 5% discount, above that granted retailers and applicators, which varied in time and place depending upon competitive conditions; denies discrimination in price between purchasers; says any differentials in price made only due allowance for differences in manufacturing cost, sale or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof and were made in good faith to meet equally

low prices of competitors; denies that the effect of any act done by it and charged in the complaint may be to substantially lessen competition or tend to create a monopoly in any line of commerce or injure competition; denying all charges not specifically admitted.)

(b) Whether the effect of such price discrimination as charged, in Paragraphs 4 and 5 of the complaint have been or may be substantially to lessen competition in commerce, as charged, and to injure or prevent competition between buyers receiving the benefit of such discriminatory prices and those from whom they were withheld.

The effect also has been or may be to tend to create a monopoly in those favored purchasers in the said line of commerce in the trade areas where they and their disfavored competitors operate.

Such price discriminations by respondent between buyers of the product of like grade and quality while operating in interstate commerce, as charged, violate the law.

(Respondent denies all the allegations of Paragraph 6 of the complaint.)

### B. The Issues

The issues in conflict within the framework of the pleadings are:

(a) Whether price discriminations were granted by respondent to some purchasers while being withheld from others, who, as its customers, were competitively engaged with each other in the same general trade area;

(b) Whether the effect of such price discrimination as charged if found to exist, has been or may be, substantially, to lessen competition in interstate commerce, as charged, and to injure or prevent competition between such favored buyers and those from whom discriminatory prices were withheld;

(c) Whether or not such acts and practices, on the part of respondent, as charged, and if found to exist, have had the effect or may tend to create a monopoly in favored purchasers while carrying on interstate commerce, in the product, in the same general trade areas, where they and their less favored competitors operate.

### C. The Product

Respondent Ruberoid Company is one of the largest manufacturers and distributors of asbestos and asphalt roofing insulating materials in the United States. It processes, sells and distributes its products through operating branch warehouses and sales offices in various cities. It sells its product to wholesalers, retailers



and "applicators." The latter are roofing contractors and generally apply the product to buildings under a contract arrangement whereby the consumer pays both for the material and labor cost.

#### D. Interstate Character of Business

Respondent Ruberoid Company, a corporation is organized and operating under the laws of the State of New Jersey, with its principal office located at 500 Fifth Avenue, New York City, in the State of New York.

As one of the largest producers and distributors of the products in the United States, it operates branch warehouses and sales offices in Maryland, Alabama, Pennsylvania, Massachusetts and Illinois.

It sells and distributes its products in commerce between and among various states of the United States and in the District of Columbia from the state of production, shipping its products to the purchasers thereof, into and through other states of the United States, maintaining a continuous current of trade in interstate commerce between its plants and warehouses to the purchasers thereof for use and resale within such various other states and the District of Columbia.

### III. REPORT UPON THE EVIDENCE

Counsel in support of the complaint in conferences with counsel for the respondent, following a series of discussions and informal hearings before the Trial Examiner, were able to and agreed upon the following facts and conclusions which are embodied in written form, dated April 26, 1948, signed by respective counsel filed and made a part of the record.

The Trial Examiner accepts these findings of fact and conclusions, adopts them and specifically finds the following which are based upon substantial evidence:

#### A. DISCRIMINATION IN SALES TO RETAILERS AND APPLICATORS

On March 12, 1941, respondent sold A. H. White Roofing Company, 17 squares of jade green 16-inch hexagonal asbestos roofing shingles at \$6.72 per square and granted a 6% distributor's commission on this item. On March 13, 1941, respondent sold National Roofing Company, 25 squares of the same type of shingles as it sold the A. H. White Company at \$6.72 per square, and granted it both a 6% distributor's commission and a 5% wholesaler's discount on this item. (Com. Exs. 1 and 2).

On March 17, 1941, respondent sold A. H. White Roofing Company, 15 rolls of 30-pound asphalt felt at \$1.50 a roll and granted

a 6% wholesaler's discount on this item. On the same date, respondent sold F. J. Villars & Son, 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at \$1.50  
 102 a roll and granted it both a 6% wholesaler's discount and a 5% competitive discount (Com. Exs. 3 and 4).

On January 3, 1941, respondent sold David Usner Sheet Metal Works, 10 rolls of 30-pound asphalt felt at \$1.50 per roll and granted a 6% wholesaler's discount on this item. On the same date, respondent sold the Brandin Slate Company, 45 rolls of the same type asphalt felt as it sold Usner Company, at \$1.50 per roll and granted both a 6% wholesaler's discount and a 5% competitive discount on this item (Com. Exs. 5 and 6).

On January 15, 1941, respondent sold Jordy Brothers, 23 squares of blue-black hexagonal asbestos roofing shingles at \$6.52 per square and granted a 6% distributor's commission on this item. On the same date, respondent sold National Roofing Company, 10 squares of the same type of shingle that it sold Jordy Brothers at \$6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 7 and 8).

On January 28, 1941, respondent sold David Usner Sheet Metal Works, 20 squares of tile red dutchlap asbestos roofing shingles at \$6.84 per square and granted a 6% distributor's commission on this item. On the same date, respondent sold Hibernia Roofing Company, 20 squares of tile red dutchlap asbestos roofing shingles at \$6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 9 and 10).

On May 3, 1941, respondent sold A. H. White Roofing Company, 25 rolls of 15-pound asphalt felt at \$1.42 per roll. On the same date, respondent sold Brandin Slate Company 50 rolls of the  
 103 same type of asphalt felt at \$1.42 per roll and granted a 5% competitive discount on this item (Com. Exs. 11 and 12).

On August 4, 1941, respondent sold David Usner Sheet Metal Works, 26 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted a 6% distributor's commission on this item. On July 29, 1941, respondent sold Brandin Slate Company, 146 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 13 and 14).

On February 8, 1941, respondent sold Jordy Brothers, 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company, 15 squares of the same type of shingle at \$6.52 per square and granted a 6% distributor's commission on

this item. On February 7, 1941, respondent sold Brandin Slate Company, 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at \$3.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 15, 16, and 17).

On April 7, 1941, respondent sold Jordy Brothers, 15 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted a 6% distributor's commission. On the same date, respondent sold to Brandin Slate Company, 8 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 18 and 19).

On May 2, 1941, respondent sold Joseph Modenbach & Sons, 21 squares of blue-black dutchlap asbestos roofing shingles at 104 \$6.84 per square and granted a 6% distributor's commission. On the same date it sold F. J. Villars & Son, 40 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 20 and 21).

On May 23, 1941, respondent sold David Usner Sheet Metal Works, 24 squares of blue-black 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and granted a 6% distributor's commission. On May 21, 1941, it sold National Roofing Company, 50 squares of the same type of shingles at \$6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 22 and 23).

On April 24, 1941, respondent sold Jordy Brothers, 27 squares blue-black 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and granted a 6% distributor's commission. On April 23, 1941, respondent sold Brandin Slate Company, 70 squares of the same type of shingles at \$6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 24 and 25).

On September 29, 1941, respondent sold A. H. White Roofing Company, 50 rolls of 15 pound asphalt felt at \$1.66 per roll. On the same date, it sold the National Roofing Company, 50 rolls of the same type of felt at \$1.66 per roll and granted a 5% competitive discount (Com. Exs. 26 and 27).

On January 22, 1941, respondent sold Chassanial Roofing Company, 20 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted a 6% distributor's commission. On January 27, 1941, it sold Hibernia Roofing Company, 103 squares of blue-black dutchlap asbestos roofing shingles at \$6.84 per square and granted both a 6% distributor's

commission and a 5% wholesaler's discount (Com. Exs. 28 and 29).

On February 1, 1941, respondent sold Chassanial Roofing Company, 32 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.50 per square and granted a 6% distributor's commission. On the same date it sold Hibernia Roofing Company, 53 squares of the same type of shingles at \$6.52 per square and granted both a 6% distributor's commission and the 4% wholesaler's discount (Com. Exs. 30 and 31).

On February 19, 1941, respondent sold David Usner Sheet Metal Works, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 a square and granted a 6% distributor's commission. On the same date it sold both Brandin Slate Company 16 squares and National Roofing Company, 50 squares of the same type of shingles that it sold Usner at \$6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 33, 34, and 35).

On January 7, 1941, respondent sold Chassanial Roofing Company, 35 squares blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and granted a 6% distributor's commission. On January 9, 1941, it sold National Roofing Company, 50 squares of the same type of shingles at \$6.52 per square and granted it a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 36 and 37).

On June 30, 1941, respondent sold Joseph Modenbach & Sons, 30 rolls 30-pound asphalt felt at \$1.50 a roll. On June 24, 1941, respondent sold National Roofing Company, 75 rolls of this same type of asphalt felt at \$1.50 a roll and granted a 5% competitive discount (Com. Exs. 38 and 39).

On August 4, 1941, respondent sold Joseph Modenbach & Sons, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and 30 rolls of 30-pound asphalt felt at \$1.58 per roll and granted a 6% distributor's commission on the shingles. On August 23, 1941, respondent sold E. J. Villars & Son, 22 squares of the same type of shingles at \$6.52 per square and 65 rolls of the same type of asphalt felt at \$1.58 per roll and granted a 6% distributor's commission and a 5% wholesaler's discount on the shingles and a 5% competitive discount on the asphalt felt (Com. Exs. 40 and 41).

On April 4, 1941, respondent sold A. H. White Roofing Company, 27 squares of Snow White 12-inch asbestos weatherboard siding at \$5.88 per square and granted a 6% distributor's commission. On the same date it sold to National Roofing Company, 40 squares of the same type of siding at \$5.88 per square and granted



both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 42 and 43).

On April 16, 1941, respondent sold A. H. White Company, 40 squares of Snow White, 10-inch asbestos colonial siding at \$5.88 per square, and granted a 6% distributor's commission. On April 17, 1941, it sold National Roofing Company, 20 squares of the same type of siding at \$5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 44 and 45).

On April 22, 1941, respondent sold A. H. White Company, 50 squares of Snow White, 12-inch asbestos colonial  
107 siding at \$5.88 per square and granted a 6% distributor's commission. On the same date it sold the National Roofing Company 3 squares of the same type of siding at \$5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 46 and 47).

On June 9, 1941, respondent sold A. H. White Company, 15 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and 100 feet of blue-black, 16-inch asbestos section starters at \$3.72 per 100 feet and granted a 6% distributor's commission on these items. On June 6, 1941, respondent sold National Roofing Company, 28 squares of the same type of shingles at \$6.52 per square and 133.3 feet of the same type of blue-black starters at \$3.72 per 100 feet and granted both a 6% distributor's commission and a 5% wholesaler's discount on these two items (Com. Exs. 48, 49A and 49B).

On June 3, 1941, respondent sold A. H. White Roofing Company 200 feet of colonial gray 4 x 16 asbestos starters at 80¢ per 100 feet and granted a 6% distributor's commission. On the same date it sold Brandin Slate Company, 2,000 feet of the same type of starters at 80¢ per 100 feet and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 50 and 51).

On May 31, 1941, respondent sold David Usner Sheet Metal Works, 50 rolls of 30-pound asphalt felt and 25 rolls of 15-pound asphalt felt at \$1.42 a roll. On May 24, 1941, it sold F. J. Villars & Son, 200 rolls of 30-pound asphalt felt and 150 rolls of 15-pound felt at \$1.42 a roll and granted a 5% competitive discount (Com. Exs. 52 and 53).

On May 13, 1941, respondent sold A. H. White Roofing Company, 25 squares of Snow White 12-inch asbestos colonial  
108 siding at \$5.88 per square and granted a 6% distributor's commission. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at \$5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 54 and 55).

In New Orleans, Louisiana, respondent granted wholesale discounts on asbestos products to retail dealers and applicators who warehoused them and promoted them on an exclusive basis, as well as to wholesalers (Tr. 26, 31, 32, 33, 34). Until about April 1, 1941, respondent granted a 6% wholesaler's discount to all New Orleans purchasers of asphalt products (Com. Exs. 1, 2, 3, 4, 6, 15, 30, 32, 33, 34). This discount was not granted on sales of asphalt products made after April 1, 1941 (Com. Exs. 11, 12, 19, 20, 21, 23, 25, 26, 27, 38, 39, 40, 41, 47, 48, 49, 49A, 50, 52, 53). As heretofore set forth in this paragraph respondent granted a 5% competitive discount on asphalt to some of the customers referred to in this paragraph and not to others, which, during the period said 6% wholesale discount was given, was in addition to said wholesale discount.

Some customers of the respondent were allowed an additional  $2\frac{1}{2}\%$  discount during the period from January to April, 1941 (Tr. 41).

The respective purchasers of respondent's products enumerated herein were competing in the resale of these products, as roofing contractors or so-called "applicators" (Tr. 88, 96, 110, 113, 138, 148) and as retailers (Tr. 96).

The competition among these customers of the respondent in the sale of respondent's products was keen and as a result those customers receiving preferential discounts had a competitive advantage over these customers to whom the preferential discounts were denied.

(These facts are judicially admitted.)

The effect of the discrimination in price as found above has been substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between the purchasers receiving the benefit of said discriminatory prices and those from whom they were withheld. The effect also has been, or may be, to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various localities or trade areas in the United States where said favored customers and their competitors who are denied the preferential discount are engaged in business.

(These facts are judicially admitted.)

#### B. CONFLICT AS TO DISCRIMINATION IN SALES TO WHOLESALERS

##### (a). Contentions by counsel for respondent

The foregoing findings of facts and conclusions including price discriminations granted by respondent, to some of its buyers while

being withheld from others, who as customers were competitively engaged with each other in the same general trade area were judicially admitted, except as to wholesalers.

While thus admitting price discriminations at the applicator and retailer levels, counsel for respondent (Tr. 179) contends that the record does not show any wholesaler was given a better price than another and that there was no price discrimination at the wholesale level; the fact that there were other discriminations warrants neither an inference nor presumption that respondent will so discriminate between wholesalers in the future;

therefore that the words: "and as wholesalers" (Tr. 148) sought to be included in the proposed findings of facts and conclusion, by counsel in support of the complaint, in the next to the last subparagraph of Paragraph Four on Page 7, should be eliminated.

These words ("and as wholesalers") were eliminated in respondent's proposed findings of fact and conclusion. (This is the only remaining issue of fact in conflict. There is ambiguity in the record between the designation used by respondent of its purchasers and the functions of such.)

Respondent further contends that the evidence adduced fails to establish discrimination at the wholesale level, that is discrimination in favor of one wholesaler against another wholesaler (Tr. 184);

that there must be two or more sales to customers in competition with each other;

that a few nonfavored customers said they sold small quantities of the product at retail but none were wholesalers; in the finding "and as wholesalers" should be deleted (Tr. 185);

that the testimony of Mr. Loeb, taken as a whole, does not show that National Roofing Company was a wholesaler. It was an applicator (Tr. 186);

that it sold a small portion only of the material purchased to other roofers (Tr. 111);

that an "applicator" is one who "sells respondent's product to consumers on a contract basis, charging the consumer for the material used and the labor employed in connection with the applying of \* \* \* the materials to buildings; ninety (90%) of National's business was as a roof applicator (Tr. 111, quoted Tr. 187);

that the 6% discount on asphalt products as a wholesaler's discount had nothing to do with the function of the purchaser; all nonfavored customers got this discount and neither such customers nor Ruberoid thought they were wholesalers (Tr. 189).

On the other hand counsel in support of the complaint refers to the following testimony, and contends as follows:

Ernest J. O'Leary, general sales manager of the southern division for respondent, when asked how respondent classified its customers, replied, "in general the classification was grouped in two parts. Part 1 \* \* \* the wholesaler or jobber or wholesale distributor \* \* \* a particular group; 2 retail merchants \* \* \* lumber and building material dealers, hardware dealers, roofing contractors, or applicators" (Tr. 8).

"In the New Orleans area \* \* \* as wholesalers of our asphalt products we classify Crescent Material Service and Brandon Slate Company. \* \* \* that is all we classify as wholesalers" (Tr. 21).

Referring to asphalt products where discounts of 6% and 5% were given to wholesalers he said there were times when additional discounts of 2½% were given some customers. This was during the period from January to April 1941. They got 6% and 7½% (Tr. 7).

112 Companies getting additional 2½% discounts were National Roofing Company, Hibernia Roofing and Metal Works, and J. Wilton Jones (Tr. 40);

Julian J. Loeb, with the National Roofing and Siding Company, 2631 South Clairborne Avenue, New Orleans, engaged primarily as a roofing contractor or an applicator, says they sold a small portion of material to other roofers but the greater part of the business was as an applicator (Tr. 110);

While Mr. Carl O. Lyle, Jr. of the Crescent Material was testifying counsel for respondent stipulated that

CX 57 is a credit memo issued by Ruberoid to Crescent Service of New Orleans dated 2/28/41 allowing a discount on the asphalt group of products making a total of 6% plus 5% and 2½% maximum (Tr. 106);

Mr. O'Leary in response to a question put by the Trial Examiner, as to whether certain invoices offered in evidence showed the net amount paid by the customer and consumer, replied:

"If correctly prepared \* \* \* and presumably these invoices have been correctly prepared, the price shown at the bottom of the invoice \* \* \* is the net price paid by the customer in the case of all people where we have not extended an additional discount \* \* \* " (Tr. 124);

There is ambiguity and confusion in the designation or label used on some customers in relation to their functioning. Some were getting favored price discounts over competing customers.

113 O'Leary says: "And we have another group, another price \* \* \* we classify as asbestos shingle distributors where we give our maximum 5% \* \* \* I define the asbestos shingle distributors price as CL-6 and 5 on carload and ten-ton shipments.



Now, that may be extended to a concern that may classify themselves as wholesale, and may even function as such, or to a roofing contractor or dealer who performs the function of warehousing our materials, distributing them to the various classes of business and promotes their use, usually on an exclusive basis" (Tr. 25).

Thus it is contended that while labeled "wholesalers" they were doing an applying business in the case of

Brandon Slate  
Hibernia and National

An additional 2½% price discount was given to National Roofing, Hibernia and J. Wilton Jones. National and Hibernia were competing with customers who were not receiving such discounts (Tr. 25 and contentions of counsel, Tr. 174-6).

Counsel in support of the complaint further contends that the gravamen of the offense is price discount discrimination where you have competing customers. You may call them any name you desire (Tr. 176).

#### C. PURCHASERS FUNCTIONING IN MORE THAN ONE CLASS.

On the issue of fact in conflict as to whether there is substantial evidence shown by the record regarding any price discrimination by the respondent in sales to wholesalers, there is uncertainty. This is due to the fact that the purchasers operated competitively and were designated as belonging to one class while functioning, at times, in such manner as to warrant another class designation. From the evidence it appears that one purchaser from respondent was the National Roofing and Siding Company, engaged competitively, primarily as a roofing contractor or applicator, but sold small portions of the product to other roofers. To this extent it functioned as a wholesaler, but did not enjoy the same prices as those given by respondent to Crescent Material Service. Crescent was classified as a wholesaler.

On the other hand Crescent seems to have gotten discounts on the purchase price from respondent which Brandon Slate did not get.

O'Leary, general sales manager for the Southern division for respondent, classed Brandon Slate as a wholesaler whereas Brandon functioned as an applicator.

Respondent urges there is not conclusive evidence shown that any wholesaler was given a favored price over another so as to warrant a finding of discrimination in price between wholesalers and for this reason any order should not include the class "wholesaler." While admitting discriminations at the retailer and applicator levels such acts warrant neither an inference nor a pre-

sumption that respondent will so discriminate between wholesalers in the future.

The fact that respondent operated illegally in certain relations by granting price discriminations at the applicator and retailer level does not warrant, it is asserted, the assumption that it may likewise operate illegally as to wholesalers, in the future, so as to justify including a prohibition in any order from granting discriminations to wholesalers.

115 If respondent has not discriminated between wholesalers, it has violated no provision of the Act as to such purchasers.

Obviously it cannot be assumed, in the absence of substantial evidence of a threat, that it expects to discriminate, at such level, in the future. The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. It will then not grant price discriminations to its competing wholesale customers, within the same general trade areas where the defined effect on commerce is shown.

The effect of such evidence as is shown regarding discrimination at the wholesale level, or purchasers who may have functioned temporarily as such, might have been further eroded away had respondent offered any rebuttal evidence showing such acts were inadvertent, in isolated cases only, and limited as to time, volume, and the area involved. It offered no evidence in explanation or justification of such acts.

#### D. DISCRIMINATION IN SALES TO PURCHASERS WHO FUNCTIONED IN TWO CLASSES FOUND

The Trial Examiner finds from the entire record there is not sufficient substantial evidence of two or more sales showing price discrimination by respondent as to wholesalers. He further finds there is not sufficient evidence of an immediate threat, based on past conduct, to justify an order specifically restraining respondent and limiting the order to restraint from anticipated future price discriminations as to wholesalers.

However, where a respondent is found to have discriminated in price an order may properly require cessation  
116 from such specific practice, directed against such practice and the purchasers as a class, or any class where the basic element of functionally related illegal conduct in the form of price discrimination has been shown.

To make the order effective it may be in the alternative and include the restraint of prohibited acts as well as requiring affirmative conduct. It is necessary to cover the evil found to exist and restraint of incidental acts necessary to achieve the main objective.

The power to correct evils should be coextensive with the responsibility imposed.

The incidental acts should bear resemblance to those found to be unlawful, within the provisions of the specific statute under which the charge was brought and found to have been violated. To justify such proposed inclusion in an order, the record should show, in addition to the acts committed, danger of future commission through sales to the same purchasers or others related if of different names but all within the direct prohibitions of the statute involved or reasonably necessary to accomplish the preventive result desired, which in the instant case is price discrimination at any level.

By a prohibitory order, respondent is put on notice that discriminatory discounts granted to retailers and applicators is unlawful and would also likewise be unlawful if granted to any other purchasers similarly situated under whatsoever name.

The order should contain an inhibition against respondent selling its products to any purchasers, however designated by either the seller or purchaser as a class, who in fact functions in such same class with others competitively engaged, for higher  
117 prices than the prices charged such others thereof who in fact actually compete with them in the sale and distribution of such products.

Respondent admits discrimination at the retailer and applicator levels.

The basic evil related to be eliminated is discrimination at any level.

Respondent is presumed to want to operate legally and refrain from any future discrimination. Therefore restraint against any discrimination will work no hardship on respondent.

With jurisdiction of the parties and being fully informed, inclusion of a restraint provision against any discrimination in an order, will discharge the Commission's full duty and prevent future evil.

It is therefore further found from the record that there was price discrimination in sales by respondent to purchasers functioning in other than the one generally designated class. Such favored purchasers functioned in more than one group, competitively in the same trade area, substantially affected commerce therein and may tend to create a monopoly. The order should contain a provision restraining this evil through sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such.

Such provision will correct the price discrimination at any level of conduct.

## IV. RECOMMENDED FINDINGS AND CONCLUSIONS

## 1. Paragraph One. Basis of authority and charges preferred.

The Federal Trade Commission, by virtue of the authority vested in it, and believing The Ruberoid Company, a corporation, was and had been violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, issued its complaint, on July 26, 1946, against such corporation, respondent, charging in substance that it had discriminated in price in the sale of roofing and insulating materials in violation of such Act.

## 2. Paragraph Two. The issues in conflict

The issues in conflict within the framework of the pleadings are:

(a) Discrimination.—Whether price discriminations were granted by respondent to some purchasers while being withheld from others, who as its customers, were competitively engaged with each other in the same general trade area;

(b) Effect on Interstate Commerce.—Whether the effect of such price discriminations as charged, if found to exist, has been or may be, substantially to lessen competition in interstate commerce, as charged, and to injure or prevent competition between such favored buyers and those from whom discriminatory prices were withheld;

119 (c) Monopoly.—Whether or not such acts and practices on the part of respondent, as charged and if found to exist, have had the effect or may tend to create a monopoly in favored purchasers while carrying on interstate commerce, in the product in the same general trade areas, where they and their less-favored competitors operate.

3. Paragraph Three. The hearings and record.—Hearings for the receipt of evidence were held in various parts of the country. Full opportunity was afforded counsel for the respective parties to offer evidence, file briefs, to confer informally and be heard on oral argument.

The Trial Examiner being fully informed and after due consideration of the entire administration record, hereby makes his recommended decision and form of order.

4. Paragraph Four. The type of business.—Respondent, Ruberoid Company, is a New Jersey corporation maintaining its principal office for the conduct of its business at 500 Fifth Avenue in New York City. It is engaged in processing, manufacturing, selling and distributing asbestos, asphalt roofing, insulating materials, and allied products in all parts of the United States.



5. Paragraph Five. Scope of the business.—It is one of the largest manufacturers and distributors of the products involved in the United States. It has branch warehouses and sales offices in Maryland, Alabama, Pennsylvania, Massachusetts and 120 Illinois selling its products directly to wholesalers, retailers, and applicators. The term "applicator" is applied to any purchaser who thereafter sells the products to consumers, usually on a contract basis, and charges them for both the material used and the labor required in applying the materials to the buildings. This type of operator, purchasing the products, also refers to building or roofing contractors.

6. Paragraph Six. Interstate aspects.—Respondent sells and distributes its products in commerce from the point of origin in New Jersey, shipping such to purchasers located in various other states of the United States and the District of Columbia. It has maintained a continuous flow of trade in interstate commerce, in such products from its plants or warehouses to the purchasers thereof so located.

7. Paragraph Seven. Competition.—While thus engaged respondent is in substantial competition with other manufacturers and sellers of the same products who are likewise conducting an interstate business therein.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the various general trade areas.

8. Paragraph Eight. Differentials in price.—Respondent granted price differentials when selling some of its purchasers while withholding such favors from others who were competing in the same trade areas in the purchase and sale of the same type of product. These were granted to retailers and applica- 121 tors and are admitted by respondent. Some such sufficient to show the pattern are as follows:

On March 12, 1941, respondent sold A. H. White Roofing Company, 17 squares of jade green 16-inch hexagonal asbestos roofing shingles at \$6.72 per square and granted a 6% distributor's commission on this item. On March 13, 1941, respondent sold National Roofing Company, 25 squares of the same type of shingles as it sold the A. H. White Company at \$6.72 per square, and granted it both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 1 and 2).

On March 17, 1941, respondent sold A. H. White Roofing Company, 15 rolls of 30-pound asphalt felt at \$1.50 a roll and granted a 6% wholesaler's discount on this item. On the same date, respondent sold F. J. Villars & Son, 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at \$1.50 a

roll and granted it both a 6% wholesaler's discount and a 5% competitive discount (Com. Exs. 3 and 4).

On February 8, 1941, respondent sold Jordy Brothers, 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company, 15 squares of the same type of shingle at \$6.52 per square and granted a 6% distributor's commission on this item. On February 7, 1941, respondent sold Brandin Slate Company, 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at \$6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 15, 16 and 17).

On September 29, 1941, respondent sold A. H. White Roofing Company, 50 rolls of 15-pound asphalt felt at \$1.66  
122 per roll. On the same date, it sold the National Roofing Company, 50 rolls of the same type of felt at \$1.66 per roll and granted a 5% competitive discount (Com. Exs. 26 and 27).

On June 30, 1941, respondent sold Joseph Modenbach & Sons, 30 rolls 30-pound asphalt-felt at \$1.50 a roll. On June 24, 1941, respondent sold National Roofing Company 75 rolls of this same type of asphalt felt at \$1.50 a roll and granted a 5% competitive discount (Com. Exs. 38 and 39).

On August 4, 1941, respondent sold Joseph Modenbach & Sons, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and 30 rolls of 30-pound asphalt felt at \$1.58 per roll and granted a 6% distributor's commission on the shingles. On August 23, 1941, respondent sold F. J. Villars & Son, 22 squares of the same type of shingles at \$6.52 per square and 65 rolls of the same type of asphalt felt at \$1.58 per roll and granted a 6% distributor's commission and a 5% wholesaler's discount on the shingles and a 5% competitive discount on the asphalt felt (Com. Exs. 40 and 41).

On April 22, 1941, respondent sold A. H. White Company, 50 squares of Snow White, 12-inch asbestos colonial sidings at \$5.88 per square and granted a 6% distributor's commission. On the same date it sold the National Roofing Company 3 squares of the same type of siding at \$5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 46 and 47).

On May 13, 1941, respondent sold A. H. White Roofing Company, 25 squares of Snow White 12-inch asbestos colonial siding  
123 at \$5.88 per square and granted a 6% distributor's commission. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at \$5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 54 and 55).

9. Paragraph Nine. Discrimination as to retailers and applicators admitted.

Discrimination as to retailers and applicators who resold the products purchased from respondent, to consumers on a contract arrangement covering both the cost of material and labor, has been judicially admitted and is so found.

The evidence as to discrimination at the wholesale level is in conflict. Ambiguity arises from the function of the purchaser in relation to his designation as a class.

#### A. RESPECTIVE VIEWS OF COUNSEL REGARDING DISCRIMINATION AS TO WHOLESALERS

Counsel for respondent urges: there must be two or more sales to wholesalers, customers and who are in competition with each other in order to establish price discrimination between such; that the weight of the evidence does not support a finding of discrimination by respondent against wholesalers; therefore an order should not include a prohibition against discriminatory sales to wholesalers as a class.

Counsel in support of the complaint contends: that there is evidence that some of respondent's customers conduct a wholesale business although the major part thereof is that of a retailer or applicator; that while this evidence may not be as conclusive as that showing price discrimination at the retail and applicator levels, it is uncontradicted; that too narrow  
124 adherence to the technical classification of purchasers without consideration of their functions, might preclude corrective action under this proceeding, where subsequent discriminations, between competing customers, occurred; that the gravamen of the offense is price discrimination where you have competing customers; and that you may call such purchasers any name you desire.

#### B. COMMENT OF THE TRIAL EXAMINER

On this issue of fact in conflict there is confusion. This is due because purchasers were designated as belonging to one class while functioning at times, in such manner as to indicate another class designation.

National Roofing, engaged primarily as a roofing contractor or applicator, sold small quantities of the product to other roofers. Thus while functioning as a wholesaler it did not enjoy the same prices as those granted by respondent to Crescent which was classed as a wholesaler.

Crescent enjoyed favored discounts over Brandon Slate. Respondent's manager classed Brandon as a wholesaler, whereas it functioned as an applicator.



The fact that respondent operated illegally in certain sales to retailers and applicators does not warrant the assumption that it will so operate in the future, as to wholesalers. This is especially cogent in the absence of substantial evidence of threat.

The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. Respondent will then neither grant price discriminations to competing wholesalers nor to any purchasers however designated where the defined effect on commerce is shown.

125. Upon consideration of the entire administrative record, the Trial Examiner is of the opinion and it is accordingly found that there is not sufficient substantial evidence showing two or more sales by respondent at discriminatory prices to wholesalers nor is there sufficient evidence of a threat based on past conduct, to justify a provision in an order restraining respondent and limited in the order to anticipated future price discriminations strictly to sales to wholesalers.

Where discrimination has been found, the order should specifically restrain respondent from such practice in making sales to purchasers as a class or any class where the basic related element, functionally, of illegal conduct in price discrimination exists. It is necessary to cover the evil found to exist and restrain incidental acts essential to achieve the end sought. The power to correct evils should be coextensive with the responsibility imposed.

The incidental acts should be related to those found to be unlawful and within the specific provisions of the statute violated. Further, danger of future violations by sales to the same purchasers or others related even if of a different class, should be shown to exist. The objective is to prevent price discrimination, at any level and under whatever class the purchaser is functioning, irrespective of his designation.

We have discrimination at the retailer and applicator level. Since respondent is presumed both to want to operate within the area of legality and avoid future discriminations inclusion of a restraint provision, in an order, will visit no hardship. With jurisdiction of the parties and being fully informed inclusion of such restraint provision in an order will discharge the duty imposed by the statute and prevent future evil.

126 C. FINDING OF DISCRIMINATION IN SALES DUE TO DUAL  
FUNCTIONING-BY PURCHASERS

The Trial Examiner is of the further opinion and it is therefore found and concluded that discrimination existed in other than the class groups designated which were retailers and ap-



plicators. That favored purchasers functioned in more than one trade group competitively, in the same trade area which substantially affected commerce therein and may tend to create a monopoly.

The order should contain a provision restraining this evil by preventing sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such.

#### 10. Paragraph Ten. Effect on Interstate Commerce

The effect of the discrimination in price, found herein, has been substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between the purchasers receiving the benefit of said discriminatory prices and those from whom they were withheld. The effect also has been, or may be, to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various trade areas in the United States where said favored customers and their competitors who are denied the preferential discount are engaged in business.

#### 11. Conclusion

The aforesaid discriminations in price by the respondent, as herein found, constitute violations of subsection (a) of

Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act of Congress approved June 19, 1936 (Robinson-Patman Act).

Having made a recommended decision covering findings of subordinate facts, ultimate conclusions of fact and law, based upon the entire administrative record, the Trial Examiner now recommends the following order be issued.

#### V. ORDER TO CEASE AND DESIST

It is ordered, that the respondent, The Ruberoid Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the sale of asbestos and asphalt roofing, insulating materials and allied products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality as among purchasers:

1. By selling said products to some retailers thereof for higher prices than the prices charged other retailers thereof who in fact compete with them in the sale and distribution of such products.

2. By selling said products to some "applicators" thereof at prices higher than the prices charged other "applicators" thereof who in fact compete with them in the sale and distribution of such products.

3. By selling said products to retailers and applicators or either who also function as wholesalers by reselling such product, for higher prices than the prices charged others competing with them in the same respective group classification in the sale and distribution of such products.

4. By selling said products to any purchaser, however designated, who in fact functions as a class the same as others competitively engaged, for higher prices than the prices charged such others thereof who in fact compete with them in the sale and distribution of such products.

It is further ordered, that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Respectfully submitted.

Charles B. Bayly,  
CHARLES B. BAYLY,  
*Trial Examiner.*

CBB:ib.

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#### BEFORE FEDERAL TRADE COMMISSION

*Exceptions to the Trial Examiner's recommended decision by  
counsel in support of the complaint*

July 22, 1948

Now comes counsel in support of the complaint and files his exceptions to the trial examiner's recommended decision, as follows:

One. Exception is taken to the following finding:

"The fact that respondent operated illegally in certain sales to retailers and applicators does not warrant the assumption that it will so operate in the future, as to wholesalers. This is especially cogent in the absence of substantial evidence of threat" (p. 21, paragraph 4, of subdivision B, of paragraph 9).

The fact that the respondent did operate illegally by discriminating in price between its customers, as borne out by overwhelming evidence and as conceded by the respondent, warrants the opposite assumption to that found by the trial examiner. The facts warrant the assumption that the respondent will operate

illegally in the future irrespective of the functional classification of its customers.

Two. Exception is taken to the following finding:

"The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. Respondent will then neither grant price discriminations to competing wholesalers nor to any purchasers however designated where the defined effect on commerce is shown" (p. 21, paragraph 5, of subdivision B, of paragraph 9).

This presumption could only prevail in the absence of any evidence of illegal practices by the respondent. It is completely overcome by the evidence of the discriminatory practices of the respondent in selling to its customers.

This finding stems from the generosity of the trial examiner rather than from the record in this proceeding.

Three. Exception is taken to the following finding:

"Upon consideration of the entire administrative record, the Trial Examiner is of the opinion and it is accordingly found that there is not sufficient substantial evidence showing two or more sales by respondent at discriminatory prices to wholesalers ~~nor is~~ there sufficient evidence of a threat based on past conduct, to justify a provision in an order restraining respondent and limited in the order to anticipated future price discriminations strictly to sales to wholesalers" (p. 21, paragraph 6, of subdivision B, of paragraph 9).

The uncontradicted evidence shows that National Roofing (Tr. 110) and American Slate and Roofing Company (Tr. 148) were competing as wholesalers, at least in a portion of their business, along with Crescent Materials.

The findings of the trial examiner, as enumerated in exceptions 1, 2, and 3, are not consistent with his finding in subsection C of paragraph Nine (p. 22) wherein he properly found and concluded:

"That discrimination existed in other than the class group designated which were retailers and applicators."

In view of the additional findings made by the trial examiner to those enumerated in exceptions 1, 2 and 3 and appearing in subsection B of paragraph Nine (pp. 20-21), together with his recommended order to cease and desist, the Commission should not seriously consider the findings referred to in exceptions 1, 2, and 3. These particular findings must be considered as a charitable gesture on the part of the trial examiner towards the respondent.

Four. Exception is taken to the failure of the trial examiner to find that respective purchasers of respondent's products were



competing in the resale of these products as "wholesalers," as well as retailers and so-called applicators.

Five. Exception is taken to the following finding:

"The Trial Examiner finds from the entire record there is not sufficient substantial evidence of two or more sales showing price discrimination by respondent as to wholesalers. He further finds there is not sufficient evidence of an immediate threat, based on past conduct, to justify an order specifically restraining respondent and limiting the order to restraint from anticipated future price discriminations as to wholesalers" (p. 15, 1st paragraph, subdivision D).

This is the same exception as referred to in exception No. 3.

Six. The following paragraph appears on page 14, 8th paragraph, subdivision C:

"\* \* \* The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. It will then not grant price discriminations to its competing wholesale customers, within the same general trade areas where the defined effect on commerce is shown."

If the foregoing statement is a specific finding made by the trial examiner, then an exception is taken thereto and this exception is embodied in exception 2. On the other hand, if this is merely a restatement of contention by counsel for the respondent, of course, no exception is taken.

Respectfully submitted.

James I. Rooney,

JAMES I. ROONEY,

*Counsel in Support of the Complaint.*

JIR:mc.

#### BEFORE FEDERAL TRADE COMMISSION

#### *Exceptions of The Ruberoid Company, respondent, to the recommended decision of the Trial Examiner*

Now comes the respondent, The Ruberoid Company, and files the following exceptions to the recommended decision of the Trial Examiner in the above entitled proceeding, which recommended decision was served on counsel for the respondent July 14, 1948:

1. Exception is taken to the statement that extensive hearings were held for the taking of testimony and receipt of documentary evidence in various parts of the United States (Rec. Dec., p. 1). The only hearing at which evidence was presented was in New Orleans, Louisiana, March 7, 8, and 11, 1946 (Tr. 1-156 inc.).



133 It was followed by short hearings in Washington, D.C., at which no further evidence was introduced, but at which the evidence was closed and arguments were made to the Trial Examiner (Tr. 156-192 inc.).

2. Exception is taken to the statement that the complaint was issued on July 26, 1933 (Rec. Dec., p. 2). The complaint was issued July 26, 1943.

3. Exception is taken to Subparagraph C entitled "The Product" (Rec. Dec., p. 4) in that it does not state that the respondent sold asbestos and asphalt products in a different manner and with different discounts (Tr. 10, 11, 24, 25, 26, Rec. Dec., pp. 5-10).

4. Exception is taken to the statement, "There is ambiguity in the record between the designation used by respondent of its purchasers and the functions of such" (Rec. Dec., p. 11). Respondent contends that there is no such ambiguity (Tr. 21-34, inc., 80, 85, 87, 94, 100, 104, 110, 111, 113, 139, 140, 141, 143, 154).

5. Exception is taken to the form of the quotation which indicates that Crescent Materials Service and Brandin Slate Company were classified as wholesalers in the New Orleans area (Rec. Dec., p. 12). The word "presently" (Tr. 21) is omitted. Brandin Slate Company was classified as a wholesaler of asphalt products only by Mr. O'Leary (Tr. 21). Mr. O'Leary spoke as of 1946 (Tr. 21). The evidence as to discriminations does not relate to any period after 1942. The record does not show that Brandin Slate Company got any larger discount on asphalt products than applicators and retailers, nor does it show that Brandin wholesaled asphalt products (Rec. Dec., pp. 5-10, inc.; Tr. 134 138-141). Brandin was not classified a wholesaler of asbestos products (Tr. 26).

6. Exception is taken to the statement that discounts of 6% and 5% were given to wholesalers (Rec. Dec., p. 12). These discounts were given to retailers and applicators as well (See Rec. Dec., p. 10, and references to transcript therein).

7. Exception is taken to the statement that CX 57 is a credit memo issued by Ruberoid to Crescent Materials Service of New Orleans dated 2/28/41 allowing a discount on the asphalt group of products making a total of 6% plus 5% and 2½% maximum (Rec. Dec., p. 12). The evidence fails to show what discounts Crescent was given (Tr. 104-108).

8. Exception is taken to the statement that there is ambiguity and confusion in the designation or label used on some customers in relation to their functioning (Rec. Dec., p. 13). Respondent contends that there is no such ambiguity and confusion. (See references, Exception 4.)

9. Exception is taken to the statement that "while labeled 'wholesalers' they were doing an applying business in the case of Brandin Slate, Hibernia and National" (Rec. Dec., p. 13). The evidence does not show that Brandin, Hibernia, or National were wholesalers or were labeled wholesalers during the period in question (Tr. 21, 110, 111, 112, 113, 114).

10. Exception is taken to the statement "You may call them (competing customers) any name you desire" (Rec. Dec., p. 13). Respondent contends that wholesalers should  
135 be called wholesalers, that retailers should be called retailers, and that applicators should be called applicators.

11. Exception is taken to the statement that purchasers were designated as belonging to one class while functioning at times in such manner as to warrant another class designation (Rec. Dec., pp. 13-14). Respondent contends that the evidence does not support this statement (Tr. 21-34, inc., 80, 85, 87, 94, 100, 104, 110, 111, 113, 139, 140, 141, 143, 154).

12. Exception is taken to the statement that National Roofing and Siding Company functioned as a wholesaler (Rec. Dec., p. 14). The testimony is clear that this company is a retailer and applicator (Tr. 110, 111, 112). The fact that there is also testimony that the company sold some small quantity of products to retailers (Tr. 111) at some time which is not disclosed by the evidence and for prices which are not disclosed by the evidence, should not be considered as proof that the company operated as a wholesaler during the period covered by the complaint, particularly in the face of overwhelming direct testimony that it was a retailer and applicator (Tr. 22, 110, 111, 112).

13. Exception is taken to the statement that Crescent seems to have gotten discounts on the purchase price from respondent which Brandin Slate did not get (Rec. Dec., p. 14). Respondent contends that this is not supported by the testimony (Tr. 104-108).

14. Exception is taken to the statement that Mr. O'Leary classed Brandin Slate as a wholesaler whereas Brandin functioned  
136 as an applicator (Rec. Dec., p. 14). Mr. O'Leary testified only that in 1946 Brandin Slate was classified as a wholesaler of asphalt products (Tr. 21).

15. Exception is taken to the statement that "the effect of such evidence as is shown regarding discrimination at the wholesale level, or purchasers who may have functioned temporarily as such, might have been further eroded away had respondent offered any rebuttal evidence showing such acts were inadvertent, in isolated cases only, and limited as to time, volume, and the area involved," and that "it offered no evidence in explanation or justi-

fication of such acts" (Rec. Dec., pp. 14-15). Respondent contends that this statement is unwarranted. The evidence did not show any discrimination at the wholesale level, and there was no occasion for the respondent to prove a negative.

16. Respondent excepts in its entirety to that part of the recommended decision which is entitled "D. Discrimination in sales to purchasers who functioned in two classes found" (Rec. Dec., pp. 15, 16). This part of the recommended decision is not factual but is argumentative. It ends by saying:

"The order should contain a provision restraining this evil through sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such."

This part of the recommended decision appears to advocate that an order be entered, the effect of which would be to restrain the respondent from violating the Robinson-Patman Act in any way.

The respondent contends that the order should be based on the facts of the case. *Milk and Ice Cream Can Institute v. Federal Trade Commission*, 152 F. (2d) 478, 483.

17. Exception is taken to the entire paragraph on page 16 beginning "It is therefore further found that there was price discrimination in sales by respondent to purchasers functioning in other than the one generally designated class" (Rec. Dec., 16). Respondent contends that this paragraph is not supported by the evidence (Tr. 21-34 inc. 80, 85, 87, 94, 100; 104, 110, 111, 113, 139, 140, 141, 143, 154).

18. Exception is taken to the statement that "Hearings for the receipt of evidence were held in various parts of the country" in Paragraph 3 of the recommended findings (Rec. Dec., p. 17). The only hearings for the receipt of evidence were held in New Orleans (Tr. 1-156).

19. Exception is taken to the second sentence of Paragraph 9 of the recommended findings to the effect that "evidence as to discrimination at the wholesale level is in conflict" and that "ambiguity arises from the function of the purchaser in relation to his designation as a class" (Rec. Dec., p. 20). Respondent contends that there is no evidence of discrimination at the wholesale level and that there is no such ambiguity. (See references, Exception 4.)

20. Exception is taken to the statements of the first three Sub-paragraphs of Paragraph B entitled "Comment of the Trial Examiner" (Rec. Dec., p. 20). Respondent contends that there is no confusion as to class designation (See references; Exception 4), that the evidence does not support the statement that National



Roofing functioned as a wholesaler (Tr. 110, 111, 112), or that Crescent enjoyed favored discounts over Brandin (Tr. 104-138 108), or that Brandin was classified as a wholesaler during the period in question (Tr. 21, 138-141).

21. Respondent excepts to the last three paragraphs of the "Comment of the Trial Examiner" (Rec. Dec., p. 21). These paragraphs do not appear to be factual, but are argumentative, and the gist of the argument seems to be that an order should be entered broader than is warranted by any discrimination shown by the evidence.

22. Exception is taken to the whole of Subparagraph C entitled "Finding of discrimination in sales due to dual functioning by purchasers" (Rec. Dec., p. 22). Respondent contends that the evidence does not support a finding that discrimination existed in other than the class groups designated as retailers and applicators and that favored customers functioned in more than one trade group competitively (Tr. 21-34 inc. 80, 85, 87, 94, 100, 104-113 inc. 139, 140, 141, 143, 154). Respondent therefore objects to the order containing any provision "restraining this evil by preventing sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such."

23. Respondent excepts to the inclusion of the proposed Paragraph 3 in the proposed order to cease and desist (Rec. Dec., p. 23). Respondent contends that the evidence does not show discrimination due to purchasers operating at more than one functional level, and that there is therefore no basis for the inclusion of the proposed Paragraph 3. (See references, Exception 22.)

24. Respondent excepts to the inclusion of the proposed Paragraph 4 in the proposed order to cease and desist (Rec. Dec., p. 23). Respondent contends that such a paragraph would constitute a blanket injunction against violating the Robinson-Patman Act and is not supported by the evidence in the case. *Milk and Ice Cream Can Institute v. Federal Trade Commission*, 152 F. (2d) 478, 483.

25. Respondent excepts to the failure of the Trial Examiner to include in his proposed order to cease and desist the following paragraph submitted by counsel for the respondent.

"Provided, however, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered, and provided that nothing herein contained shall prevent respondent rebutting a prima facie case based upon discriminatory practices made subsequent to the



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issuance of this order by showing that its lower price was made in good faith to meet an equally low price of a competitor."

Respectfully submitted.

SPENCER GORDON,  
WILLIAM M. AIKEN,  
COVINGTON, BURLING, RUELEE, ACHESON & SHORB,  
701 Union Trust Building, Washington 5, D. C.,  
Attorneys for Respondent.

140 BEFORE FEDERAL TRADE COMMISSION

Commissioners: LOWELL B. MASON, Acting Chairman, WILLIAM A. AYRES, JOHN CARSON, JAMES M. MEAD.  
[Title omitted.]

*Order on exceptions to Trial Examiner's recommended decision*  
(January 20, 1950)

EXCEPTIONS FILED BY COUNSEL SUPPORTING COMPLAINT

In substance, all of the exceptions filed by counsel supporting the complaint are directed at the conclusion of the trial examiner that the record does not establish discriminations by respondent among wholesalers. The Commission is of the view that the trial examiner's conclusion in this respect is correct.

It is therefore ordered that said exceptions be, and they hereby are, denied.

EXCEPTIONS FILED BY COUNSEL FOR RESPONDENT

Exceptions 1, 2, 18. While these exceptions relate to minor matters in the recommended decision, the exceptions are factually correct.

141 It is therefore ordered that exceptions 1, 2, and 18 be, and they hereby are, sustained.

Exception 3. This exception is directed at the failure of the trial examiner to state that respondent sold asbestos and asphalt products in a different manner and with different discounts. In the opinion of the Commission this is a matter not material to the issue in the present proceeding and it was not error for the examiner to omit the statement.

It is therefore ordered that exception 3 be, and it hereby is, denied.

Exceptions 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 22. In substance, these exceptions relate to the trial examiner's statements

with respect to the proper classification of certain dealers (whether they are wholesalers, retailers, or applicators), with respect to dual functions performed by some of these dealers, and with respect to what the examiner regards as uncertainty or confusion existing in the record as to these points. The Commission is of the view that the trial examiner's statements are substantially correct.

It is therefore ordered that exceptions 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, and 22 be, and they hereby are, denied.

Exception 6. Exception is here taken to the trial examiner's statement that certain discounts were given to wholesalers, respondent's objection being that this statement did not also include retailers and applicators. The trial examiner was here dealing only with discounts to wholesalers and the omission of any reference at this point to other dealers is immaterial.

142 It is therefore ordered that exception 6 be, and it hereby is, denied.

Exception 7. Respondent here excepts to a statement by the trial examiner that Commission Exhibit 57 and certain testimony in connection therewith shows that certain specified discounts were given to Crescent Materials Service. It appears uncertain from the evidence as to just what discounts, percentagewise were allowed in this instance.

It is therefore ordered that exception 7 be, and it hereby is, sustained.

Exceptions 16, 21, 23, 24. These exceptions are directed at the recommendation of the trial examiner with respect to the order to cease and desist, the recommendation of the examiner being that the order should be sufficiently broad in scope to prohibit discriminations in price among competing purchasers of respondent's products, irrespective of the particular designations used to describe such purchasers and their functions. In the opinion of the Commission this recommendation is sound.

It is therefore ordered that exceptions 16, 21, 23, and 24 be, and they hereby are, denied.

Exception 25. Respondent here excepts to the failure of the trial examiner to include in his recommended order certain provisos submitted by respondent. These provisos in the opinion of the Commission are unnecessary to assure respondent its full legal rights and their omission by the trial examiner was proper.

143 It is therefore ordered that exception 25 be, and it hereby is, denied.

By the Commission:

[SEAL]

D. C. Daniel,  
D. C. DANIEL,  
Secretary.

## BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

*Findings as to the facts and conclusion*

January 20, 1950

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., Sec. 13) The Federal Trade Commission on July 26, 1943, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with violation of subsection (a) of section 2 of that Act as amended. After the filing by respondent of its answer to the complaint and after certain evidence in support of the complaint had been introduced before a trial examiner of the Commission theretofore duly designated by it, counsel supporting the complaint and counsel for respondent agreed that the matter might be determined upon the evidence introduced up to that time, without the necessity of further evidence. Thereafter, the proceeding regularly came on for final consideration by the Commission upon the complaint, answer, evidence, recommended decision of the trial examiner, the briefs of counsel, and oral argument; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

## FINDINGS AS TO THE FACTS

Paragraph One. The respondent, The Ruberoid Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York. Respondent is now and since June 19, 1936, has been engaged in the business of processing, manufacturing, offering for sale, selling, and distributing asbestos and asphalt roofing, insulating materials, and allied products.

Respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating materials and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Maryland; Mobile, Alabama; Erie, Pennsylvania;



Millis, Massachusetts; and Chicago, Illinois. Respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicator" herein used applies to purchasers known as building or roofing contractors, who apply to buildings the products purchased from respondent. The applicator usually sells respondent's products to consumers on a contract basis, charging the consumer for the material used and the labor employed in connection with the applying of the products to buildings.

Paragraph Two. Respondent sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia, and preliminary to or as the result of such sales causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various States of the United States and in the District of Columbia. There is, and at all times mentioned herein, has been, a continuous current of trade and commerce in such products across State lines between respondent's plants, factories, or warehouses and the purchasers of such products. The products are then sold and distributed for use and resale within the various States of the United States and the District of Columbia.

Paragraph Three. In the course and conduct of its business, respondent has been and is in substantial competition with other manufacturers and sellers of similar products who have been and are engaged in the sale of such products in commerce between and among the various States of the United States.

146 Many of respondent's customers are competitively engaged with one another and with the customers of respondent's competitors in the resale of asbestos and asphalt roofing, insulating materials, and allied products within the several trade areas in which respondent's customers respectively offer for sale and sell the products purchased from respondent.

Paragraph Four. In the sale of its products in commerce, as aforesaid, respondent has discriminated in price by selling its products to some of its customers at prices lower than those at which it sells products of like grade and quality to other customers who compete with such favored customers in the resale of such products. Among the specific instances of discrimination disclosed by the record are the following, all of the purchasers involved being located in the New Orleans, Louisiana, trade area:

On March 12, 1941, respondent sold A. H. White Roofing Company 17 squares of jade green, 16-inch hexagonal asbestos roofing shingles at \$6.72 per square, and granted a 6% discount on this item. On March 13, 1941, respondent sold National Roofing Company 25 squares of the same type of shingles as it sold A. H. White



Company at \$5.72 per square, and granted it a 6% discount and a further discount of 5%.

On March 17, 1941, respondent sold A. H. White Roofing Company 15 rolls of 30-pound asphalt felt at \$1.50 a roll, and granted a 6% discount on this item. On the same date respondent sold F. J. Villars & Son 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at \$1.50 a roll, and granted it a 6% discount and a further discount of 5%.

147 On February 8, 1941, respondent sold Jordy Brothers 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company 15 squares of the same type of shingle at \$6.52 per square, and granted a 6% discount on this item. On February 7, 1941, respondent sold Brandin Slate Company 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at \$6.52 per square, and granted to this purchaser both a 6% and a 5% discount.

On September 29, 1941, respondent sold A. H. White Roofing Company 50 rolls of 15-pound asphalt felt at \$1.66 per roll. On the same date it sold the National Roofing Company 50 rolls of the same type of felt at \$1.66 per roll, and granted a 5% discount.

On June 30, 1941, respondent sold Joseph Modenbach & Sons 30 rolls of 30-pound asphalt felt at \$1.50 a roll. On June 24, 1941, respondent sold National Roofing Company 75 rolls of this same type of asphalt felt at \$1.50 a roll, and granted a 5% discount.

On August 4, 1941, respondent sold Joseph Modenbach & Sons 25 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and 30 rolls of 30-pound asphalt felt at \$1.58 per roll, and granted a 6% discount on the shingles. On August 23, 1941, respondent sold F. J. Villars & Son 22 squares of the same type of shingles at \$6.52 per square and 65 rolls of the same type of asphalt felt at \$1.58 per roll and granted a 6% discount and a further discount of 5% on the shingles and a 5% discount on the asphalt felt.

148 On April 22, 1941, respondent sold A. H. White Roofing Company 50 squares of Snow White, 12-inch asbestos colonial siding at \$5.88 per square, and granted a 6% discount. On the same date it sold the National Roofing Company 3 squares of the same type of siding at \$5.88 per square, and granted both a 6% discount and a 5% discount.

On May 13, 1941, respondent sold A. H. White Roofing Company 25 squares of Snow White, 12-inch asbestos colonial siding at \$5.88 per square, and granted a 6% discount. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at \$5.88 per square, and granted both a 6% discount and a 5% discount.

The respective purchasers of respondent's products referred to above were competing in the resale of these products as roofing contractors or applicators and as retailers. The competition among these customers of respondent was keen. Respondent recognized that a difference of  $2\frac{1}{2}\%$  was material to its customers in the possible diversion of trade. In fact, a difference of a dollar or more in the price of a roofing job as between equally reputable applicators could be decisive in securing the business for the applicator offering the lower price. In these circumstances customers receiving preferential discounts had a material competitive advantage over customers to whom such discounts were denied.

There is no contention on the part of respondent that the preferential discounts were justified by lower costs.

Paragraph Five. There is sharp disagreement between counsel as to whether the record establishes discriminations by respondent among wholesalers. In the opinion of the Commission, 149 the trial examiner is correct in his conclusion that there is insufficient evidence to establish such discriminations. However, as the trial examiner points out, there is some confusion on this point due to the fact that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator.

The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers.

Paragraph Six. The effect of the discriminations in price referred to herein may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between the purchasers receiving the benefit of such discriminatory prices and those from whom such prices are withheld.

The discriminations in price by respondent as herein found are violative of subsection (a) of section 2 of the aforesaid Clayton Act, as amended.

By the Commission:

[SEAL]

Lowell B. Mason,  
LOWELL B. MASON,  
*Acting Chairman.*

Attest:

D. C. Daniel,  
D. C. DANIEL,  
*Secretary.*

(January 20, 1950).

BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

*Order to cease and desist*

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner, briefs filed by counsel supporting the complaint and counsel for respondent, and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. Sec. 13):

It is ordered that the respondent, The Ruberoid Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale of asbestos or asphalt roofing materials in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price:

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who

in fact compete with the favored purchaser in the resale or distribution of such products."

It is further ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission:

[SEAL]

D. C. Daniel,

D. C. DANIEL,

Secretary.

152c In the United States Court of Appeals

[Title omitted.]

*Petition to review and set aside an order of the Federal Trade Commission*

April 25, 1950

*To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:*

Your petitioner, The Ruberoid Co., by Cyrus Austin its attorney, hereby petitions this Court to review and set aside a certain order of the Federal Trade Commission hereinafter more fully described, and respectfully shows to the Court:

I. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, in the City and State of New York.

II. On July 26, 1943, the Federal Trade Commission commenced a proceeding against petitioner pursuant to the provisions of Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. A., sec. 21), by the issuance of a complaint charging petitioner with having discriminated in price between competing purchasers of its asphalt and asbestos roofing materials in violation of

152d Section 2 (a) of said Act (49 Stat. 1526, 15 U. S. C. A., sec. 13). The said proceeding was entitled "In the Matter of The Ruberoid Company, a corporation" (F. T. C. Docket No. 5017).

III. Petitioner duly filed its answer to said complaint, admitting that it was engaged in the sale and distribution of asphalt and asbestos roofing materials (and other products) in interstate commerce, but denying that it had discriminated in price as al-



leged and denying that the effect of such discriminations, if any, had been or might be substantially to lessen competition or to injure, destroy or prevent competition with the purchasers receiving the benefit thereof.

IV. Thereafter hearings were held before Charles B. Bayly, a trial examiner duly appointed by the Commission, and testimony and other evidence was received in support of said complaint and in opposition thereto. Upon the conclusion of said hearings, the trial examiner made and filed his "Recommended Decision," including a report upon the evidence, recommended findings, and order. Exceptions thereto and briefs were filed with the Commission by petitioner and by the Commission's attorney, and the proceeding duly came on for oral argument and initial decision by and before the Commission upon the record, recommended decision of the trial examiner, exceptions and briefs.

V. On January 20, 1950, the Commission issued in said proceedings its "Findings as to the Facts and Conclusion" together with its "Order to Cease and Desist," which said order directs your petitioner, in connection with the sale of asbestos or asphalt roofing materials in interstate commerce, to cease and desist from discriminating in price

"By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

VI. This petition is filed, and the jurisdiction of this Court is invoked, pursuant to Section 11 of the Clayton Act. Petitioner carries on business within the Second Circuit.

VII. The relief hereby prayed is that the said order of the Commission be set aside, or in the alternative that the same be modified in the following respects:

(1) By limiting the prohibitions of said order to discrimination in price between purchasers of petitioner's said roofing materials competing in the resale thereof at retail, or in applied form as roofing contractors or applicators.

(2) By limiting the application of the order (by proviso or otherwise) to differentials which were found by the Commission upon the evidence to have a tendency substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such differentials are engaged, or to injure, destroy or prevent competition with purchasers receiving the benefit of such differentials.

(3) By the addition of a proviso to the effect that the order shall not be construed as prohibiting differentials which make only due allowance for differences in the cost of manufacture.

sale or delivery resulting from the differing methods or quantities in which such materials are to such purchasers sold or delivered.

152f (4) By the addition of a proviso to the effect that the order shall not be construed as prohibiting petitioner from making a lower price to any purchaser of its said materials in good faith to meet the equally low price of a competitor.

VIII. The points upon which petitioner intends to rely are:

(a) The Commission has expressly found that the discriminations in price proved, and upon which its findings are based, were discriminations in price between purchasers "competing in the resale of these products as roofing contractors or applicators and as retailers." The Commission has expressly found that the record contains no substantial evidence establishing discriminations by petitioner between wholesalers. The order, on the other hand, prohibits any price differential between purchasers of any class competing in the resale or distribution of the said roofing materials, including wholesalers and manufacturers. There is no evidence that the effect of any difference, however small, in the prices charged competing wholesalers, jobbers, manufacturers and others to whom petitioner may sell its said products for resale (other than retailers and applicators) may be to affect competition in any of the respects prohibited by Section 2 (a) of the Clayton Act. There is no evidence that a price differential of less than 2½% between competing retailers of such products may have any of the said effects on competition.

(b) The order is invalid and unlawful in that it prohibits price differentials between competing manufacturers, jobbers, 152g wholesalers and others which are not unlawful per se and as to which there is no evidence sufficient to support an inference, and no finding, that they may have any prohibited effect on competition or tend to create a monopoly. The issuance of an order prohibiting such differentials without proof thereof, and without any basis in the record for concluding that they would be unlawful if granted, is unauthorized and amounts to a denial of due process.

(c) The order prohibits any price differential between purchasers competing in the resale of petitioner's said products, including retailers and applicators, without regard for the fact that such a differential is not unlawful if it makes only due allowance for differences in petitioner's costs as provided by the first proviso of Section 2 (a) of the Clayton Act. The granting of a quantity discount or other differential which could be so justified would violate this order. Without a proviso or other limitation

excepting such lawful differentials from its scope, the order is unduly restrictive and invalid.

(d) The proviso of Section 2 (b) of the Clayton Act permits a seller charged with violation of Section 2 (a) to show in rebuttal that his lower price was made in good faith to meet the equally low price of a competitor. Petitioner has had no opportunity to make such a showing except as to the differentials specifically proved herein, and under the terms of this order would not have such an opportunity with respect to any differentials alleged to have been granted in violation thereof. The order should be modified so as to exclude from its prohibitions differentials made in good faith to meet competition.

152h Wherefore, petitioner prays that the said cease and desist order of the Federal Trade Commission be set aside, or, if the Court be of the opinion that said order should not be wholly set aside, then that the same be modified as set forth in Paragraph VII of this petition or in such other manner and to such other extent as to the Court may seem just and proper.

CYRUS AUSTIN,  
*Attorney for Petitioner.*

Dated New York, N. Y., April 25, 1950.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950.

(Argued April 4, 1951.)

Decided June 4, 1951.)

Docket No. 21667

THE RUBEROID CO., *Petitioner*;

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Before:

L. HAND, AUGUSTUS N. HAND and CLARK, *Circuit Judges*.

Petition by The Ruberoid Co. to review and set aside an order of the Federal Trade Commission. Order affirmed and enforcement granted.

CYRUS AUSTIN, of New York City (Austin & Malkan, of New York City, on the brief); *for petitioner*.

JNO. W. CARTER, JR., *Atty.*, Federal Trade Commission, of Washington, D. C. (W. T. Kelley, General Counsel, and James W. Cassidy, Asst. Gen. Counsel, Federal Trade Commission, of Washington, D. C., on the brief), *for respondent*.

CLARK, *Circuit Judge*:

On a proceeding to review an order of the Federal Trade Commission, petitioner Ruberoid Co. prays that the order be set aside, or in the alternative modified in some four respects. The order was issued upon a complaint charging petitioner with violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. §13(a). It directed petitioner to cease and desist from price discrimination in the sale of asbestos or asphalt roofing materials "by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."



The order was issued after hearings, wherein counsel for the Commission produced evidence showing that petitioner had granted discounts or price differentials of from 5% to 7½% of list price to certain of its customers. Petitioner classified its customers into three groups: wholesalers, retailers, and applicators, the last being roofing contractors who applied petitioner's products on their contract jobs for which they were paid as a whole. The Commission found active competition for the resale of petitioner's products, as well as the price discrimination noted, among the roofing contractors or applicators and the retailers. As to wholesalers, there was sharp disagreement among counsel as to whether the record established any discrimination there. The Commission noted this, and went on to hold the evidence insufficient to establish such discrimination, but pointed out "that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator." In a conclusion challenged here, it then said that the particular designations applied to the various purchasers were unimportant, the controlling factor being the establishing of price discriminations among purchasers who were in fact competing with one another in the resale of petitioner's products. So, it concluded: The corrective action "should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers."

At the hearings petitioner presented no evidence contesting the price discrimination found by the Commission and does not seriously contest the issuance of some form of order against it. It does, however, vigorously attack the order for its generality and for the particular prohibitions discussed below. We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks. Compare *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 249, 253. In formulating its orders, the Commission has tried from time to time to develop a plan; but one of its latest attempts, that in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, resulted in such failure that it is now attempting a new course, which "merely represents another milestone" in its efforts to establish a fair and just interpretation of this difficult Act. We are not justified in ordering the Commission to undertake an illusory certainty which will not stand up in the process of review.

Petitioner's requested modifications are that the order be re-framed to prohibit only differentials between purchasers of roofing materials competing in the resale thereof as applicators or retailers; to exempt differentials of less than  $2\frac{1}{2}\%$  between retailers; to contain a proviso excepting a discount for differences in petitioner's costs of manufacture, sale, or delivery, i.e., a quantity or other discount permitted under the Act itself; and to contain a proviso excluding from its prohibition differentials made in good faith to meet competition, again as permitted in the Act itself. The first two provisions, petitioner claims, are required by the evidence. The last two, involving exceptions in the Act itself, it claims to be necessary lest it either be held in contempt for lawful acts or bear the burden of showing legality.

Parenthetically we should point out that under the *Morton Salt* case, explicitly following our own decision in *Samuel H. Moss, Inc. v. E. T. C.*, 2 Cir., 148 F. 2d 378, *certiorari* denied 326 U. S. 734, the burden of proving that a seller comes within one of the Act's exceptions is placed upon the one who claims it. Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discriminations and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled.

The other two requested modifications are apparently the main reasons for plaintiff's appeal to us. Since discrimination among wholesalers was not found, the argument is that the prohibition should run against only differentials among applicators or retailers. Since no differentials under 5 per cent were found, the argument is that there is no evidence to support a finding of material discrimination in lesser differentials—specifically, those up to  $2\frac{1}{2}\%$  per cent among retailers. The first point rests upon the provision of the Act which prohibits discrimination "in price between different purchasers of commodities of like grade and quality" and previous decisions of the Commission drawing distinctions in price discrimination based upon functional differences among classes of competing purchasers. Thus the order in the *Morton Salt* case,

which appears at page 51 of 334 U. S., separately prohibits price discrimination among wholesalers and price discrimination among retailers. That fact, however, was not of importance in the decision and nothing therein states any arbitrary requirement to that effect. Here, too, the Commission's answer appears adequate, as is demonstrated by its findings and conclusions with respect to the applicators. Indeed to many of us an "applicator" who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler; moreover, as the Commission pointed out, there was no rigid differentiation of function: one applicator, for instance, sold quantities of the products to other applicators, while one wholesaler acted as an applicator. The Commission appears quite justified, therefore, in concluding that there was no real functional difference necessarily disclosed by petitioner's classification of its customers and that the order should hit the evil directly; rather than invite evasion by incorporating an ambiguous label. Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 51, 52 (1950).

As to the request for the modification permitting a  $2\frac{1}{2}$  percent differential, there seem two definite answers: First, there is nothing in the law suggesting such a limited differential; even assuming *arguendo* that the Commission perhaps might permit it on a finding of immateriality under all the circumstances, we cannot force such a finding upon it. Second, there was evidence tending to show that differentials of small amounts were important in the trade. As to the first, petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35. Proof of the violation here made should lose nothing, it would seem, because it is thorough proof of a thorough violation. Prohibition should cover in any event the violation in full.

Petitioner claims some support from the *Morton Salt* case, but we think that decision is quite definitely against the contention made. In that case the Commission expressly prohibited selling "to some wholesalers [or retailers as covered by a separate paragraph] thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers [retailers.]" The Court specifically says, 334 U. S. at page 53: "Paragraphs (a) and (b) up to the language of the provisos are approved," a statement it repeats later, 334 U. S. at page 55. It goes on to point out that the clause permitting differentials of less than five cents "would appear to benefit respondent, and no



challenge to it, standing alone, is here raised." Then it considers the respondent's objection to the final clause and holds that clause invalid for a vagueness which throws the whole question into the courts. It strikes this latter part out, but, while saying that it would sustain the order with the exception of the proviso, nevertheless concludes that the deleted part is so important that the Commission "should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary."

Thus it is quite clear that an order may legally prohibit *all* differentials, and hence the form of prohibition before us is justified by the *Morton Salt* case itself. It is to be noted that the Court does not in that case expressly approve of the small differential of five cents per case there suggested by the Commission, although it is a possible inference, in view of the purpose for which the matter was returned to the Commission, that a finding in favor of such a differential would not be illegal if based on appropriate evidence. It is clear, however, that the case does not force the Commission always to indicate some modest maximum in stating its prohibition.

Moreover, here the evidence produced by the Commission through the testimony of a sales manager for the petitioner showed that differentials of small amount and specifically of  $2\frac{1}{2}$  per cent were quite important in the realm of competition among petitioner's customer. The manager testified that in certain instances the 5 per cent discount allowed was insufficient for the customers' uses and petitioner found it therefore necessary or desirable to add an additional  $2\frac{1}{2}$  per cent. Cf. *Austin, op. cit. supra* at 48, 49. In the light of this evidence and in view of the very wide discretion given the Commission in fitting the remedy to the evil before it, *Jacob Siegel Co. v. F. T. C.*, 327 U. S. 608, 611, 612; *Charles of the Ritz Distributors Corp. v. F. T. C.*, 2 Cir., 143 F. 2d 676, 680, we are not justified in ordering the insertion of a maximum permissible discrimination, even a moderate one, in this order. It must therefore stand, for appropriate enforcement.

Order affirmed; enforcement granted.



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 149—October Term, 1950

THE RUBEROID Co., *Petitioner*,  
*against*  
FEDERAL TRADE COMMISSION, *Respondent*.

**Petition for Rehearing.**

**GROUND'S OF PETITION.**

The Ruberoid Co., respondent before the Commission, petitioned this court, pursuant to Section 11 of the Clayton Act, to review and set aside or modify a cease and desist order of the Commission. The court has affirmed the order. At the end of its opinion, and we believe without due consideration, the court has added the words "enforcement granted". This petition for rehearing is directed solely to the question of enforcement.

The Commission is not entitled to a decree of enforcement as a matter of right or of course, upon affirmance of its order. The Act does not authorize it to apply for enforcement except upon a showing that the respondent has not complied with the order after issuance. Here there is no charge or showing of violation, and no application or cross petition for enforcement was filed.\* While a formal application may not be essential, this court and other Courts of Appeals have repeatedly held that a decree directing compliance will not issue except upon a showing of violation of the order or threat of violation, applying the same principles followed by courts of equity in injunction suits generally. This case is peculiarly one calling for the application of those principles; and it is submitted that, in conformity therewith, an injunction should here be denied.

\* At the end of its brief the Commission prayed that "pursuant to the statute" the court enter a decree commanding compliance with the order, erroneously citing a provision of the Federal Trade Commission Act. That Act, of course, has no application whatever here. We regarded this as a mere inadvertence or "slip of the tongue" on the part of Commission's counsel, presenting no question under the Clayton Act.

## ARGUMENT AND AUTHORITIES.

Review and enforcement of cease and desist orders of the Commission in Clayton Act cases is governed by Section 11 of that Act, which provides:

"If such person fails or neglects to obey such order of the commission \* \* \* while the same is in effect, the commission \* \* \* may apply to the circuit court of appeals of the United States \* \* \* for the enforcement of its order, \* \* \*. Upon such filing of the application and transcript the court \* \* \* shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter \* \* \* a decree affirming, modifying, or setting aside the order \* \* \*.

"Any party required by such order of the commission \* \* \* to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order \* \* \* be set aside. \* \* \* Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order \* \* \* as in the case of an application by the commission \* \* \* for the enforcement of its order, \* \* \*.

The scheme of the Act seems clear. If the order is violated, whether or not its validity is challenged, the Commission may apply to the court for enforcement. On the other hand, a respondent who desires in good faith to comply with the Commission's directive, but questions its validity or scope, may petition for review on that issue alone without subjecting itself to a court injunction. In either case the court obtains jurisdiction of the proceeding and is empowered to affirm, set aside or modify the order, but the question of enforcement does not arise unless a violation or threat of violation appears.

The question of affirmance or setting aside, and the question of enforcement, are therefore separate and distinct. The one depends upon whether the practices prohibited were in violation of the statute, or perhaps, as in this case, only upon the scope and terms of the order. The other depends upon evidence of violation or threat of violation of the order after issuance, sufficient to justify the granting of an injunction by a court of equity. Indeed, the Commission has no need or occasion to seek an injunction so long as its order is complied with, and that is equally true whether the respondent does or does not exercise its right to have a review of the order's validity.

The considerations affecting both questions are the same regardless of which party brings the case to the court, and the courts have made no distinction. It would be inconsistent to hold that if the

Commission petitions for enforcement the court will limit itself to the question of affirmance unless violation is proved, but that if the respondent brings the case up an injunction will follow affirmance as a matter of course. Such a rule would penalize the respondent for petitioning for review. It would mean that a respondent could test an order of doubtful validity only at the risk of having to do business thereafter under a court injunction; and the risk would be a certainty where, as here, only modification was sought. It would place a premium on violation rather than review, and would add to the enforcement burden of both the Commission and the courts.

Prior to amendment in 1938 the review and enforcement provisions of Section 5 of the Federal Trade Commission Act were identical with those of Section 11 of the Clayton Act. In *Federal Trade Comm. v. Standard Education Society*, 14 F. 2d 947 (1926) upon a petition by the Commission for enforcement, the Seventh Circuit construed the said provisions as follows:

"If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory.

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"Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. It was the apparent intention of the Congress to give the practitioner of the alleged unfair methods an opportunity to mend its ways before subjecting it to a decree of court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed."

The court refused enforcement, directing a stipulation of facts or reference on the question of violation. Thereafter the proceeding was dismissed on motion of the Commission upon assurance by the respondent that it would comply with the order.

The precise question now presented came before the Court of Appeals for the Sixth Circuit in *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752 (1923). A petition for review was there filed by the respondent company. The court affirmed the order with modifications; and the Commission moved for recall of the mandate and for entry of a decree of enforcement. The court stated:



"We directed a modification of the Commission's order in certain respects, and in other respects affirmed it. The Commission now asks that this mandate be recalled, and that this Court enter its decree enjoining the Silver Company from further continuing those practices as to which we had affirmed the Commission's order. The ground of this application is that there must be an order of this court before there can be any enforcement of the Commission's order through punishment for violation; that if the application in this matter had been by the Commission for enforcement, instead of by the Silver Company for vacation, the court would have entered such an injunction order; and that, to avoid unnecessary forms and proceedings, such an order should likewise be entered when a petition for vacation is denied. \* \* \*

"We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.

"It is the general practice in such cases that if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, \* \* \*. The situation, then, is that, as to the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

This court several times has had occasion to consider the question of enforcement of Federal Trade Commission orders and has



stated the principles to be applied before granting such injunctive relief. *Butterick Co. v. Federal Trade Comm.*, 4 F. 2d 910 (1925), was a proceeding upon petition for review filed by the respondent before the Commission. The Commission filed a cross-petition for a decree of enforcement commanding petitioner to cease and desist from the practices forbidden. It appeared that petitioner was continuing to do business under contracts held by the Commission and by the court to violate the Clayton Act. The court therefore granted enforcement, but stated that it would not have done so if the violations had theretofore ceased and there were no threat of renewal. It was stated (p. 913):

"The jurisdiction of the court in this proceeding is original rather than appellate, and, since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. *Silver Co. v. Federal Trade Commission (C. C. A.)* 292 F. 752. The decree should be along the lines adopted by the courts of equity in hearing suits of injunction. It is the general practice in such cases that, if the defendant is continuing or threatening acts, there will be an injunction, but, if whatever was unlawful ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice."

In *Federal Trade Comm. v. Balme*, 23 F. 2d 615 (1928), cert. den. 277 U. S. 598, upon a petition for enforcement, this court pointed out that the statutory jurisdiction conferred must be strictly pursued, and stated (p. 618):

"Manifestly, it is very apparent that the question of violation of the commission's order would not be involved until a valid order was recognized by this court after having acquired jurisdiction. Therefore we must first examine the proceeding before the commission and determine whether there has been a violation of the law."

The court thereupon affirmed the order and referred the question of "the present violation of section 5" to the Commission for determination and report. The Commission thereafter held hearings and reported back to the court that the evidence did not then show a violation of the order. The court thereupon, on January 16, 1928, entered its order denying the Commission's prayer for a decree of enforcement.

And in *Federal Trade Comm. v. Herzog*, 150 F. 2d 450, 452 (1945) this court stated:

"The Commission asks us to enter a decree commanding obedience to its order without regard to whether the respondents have violated it"

After citing the Balme and Standard Education Society cases (*supra*), the court continued:

"We are asked to reconsider these decisions, but we see no reason to do so; no contrary decision has been cited. \* \* \* In the case at bar the violations of the Clayton Act which the Commission found occurred nearly five years ago; \* \* \*"

In the present case the price discriminations which the Commission found unlawful occurred ten years ago, in 1941. They resulted from certain discounts allowed locally for a short time to certain dealers in New Orleans, La. to meet competitive conditions then existing. The case was not tried until 1946, and it appears from the record that the discriminations had then ceased. There was no evidence of violations before or after 1941. The order herein was not issued until 1950. It might well be questioned whether the Commission was justified in holding hearings and issuing an order in a case so stale.

Furthermore, petitioner did not come before this court asserting the right to continue or renew the discriminations found unlawful by the Commission. The order was challenged only to the extent that, in terms, it prohibits what was not found unlawful and what the statute permits. We submit that application of the principles stated in the above-cited decisions points clearly to a denial of an injunction in this case.

An order of affirmance is not equivalent to a decree of enforcement. The Seventh Circuit so held in *Federal Trade Comm. v. Fairyfoot Products Co.*, 94 F. 2d 844 (1938). There the Fairyfoot company had petitioned for review of an order of the Commission, and the court had affirmed. Thereafter the Commission petitioned for a rule to show cause why Fairyfoot should not be adjudged in contempt for violating the order of affirmance. While recognizing its "wide discretion" to dispose of the questions of affirmance and enforcement in one proceeding, the court nevertheless held that contempt would not lie and dismissed the petition, stating:

§ "Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41 et seq., the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the 'cease and desist order' has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. But it does not follow that the unlawful act of disobedience can be made the

basis of a contempt proceeding in this court, even though the order of affirmance of this court, in a sense, gives legal validity to the order of the Federal Trade Commission. For the lawfulness of the order of the Commission derives ultimately from the act of Congress and not from this court's adjudication of its lawfulness.

"Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.'

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"Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question."

The Clayton Act and the Federal Trade Commission Act were enacted in 1914, the provisions for review and enforcement of cease and desist orders of the Commission being the same in each. In 1938 Congress amended Section 5 of the Federal Trade Commission Act, striking out the provision for enforcement upon application of the Commission, making the Commission's orders final unless the respondent petitions for review within 60 days, and prescribing penalties for violation. A clause was also added directing the Court of Appeals to issue a decree of enforcement in the event of affirmance upon review. The original provisions of Section 11 of the Clayton Act have not been changed. If the Commission feels that the procedure provided by the latter Act is too lenient or unduly cumbersome, then, as stated by the court in *Federal Trade Comm. v. Standard Education Society*, *supra*, its complaint should be addressed to Congress and not to this court.

Petitioner has complied with this order as interpreted by the court and desires to do so. It came to this court for assurance that the order will not be applied or construed to prohibit what the statute permits; and that assurance the court has given. No ground or need has been shown for the issuance of an injunction. Petitioner therefore prays that its petition for rehearing be granted, that the opinion herein be modified by striking therefrom the words "en-

forcement granted", and that the order or decree to be entered thereon be limited to affirmance of the order of the Commission.

Respectfully submitted,

AUSTIN & MALKAN,  
*Attorneys for Petitioner.*

CYRUS AUSTIN,  
*Of Counsel.*

United States Court of Appeals,  
Second Circuit  
Filed Jul 6, 1951  
A. M. BELL, *Clerk.*

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 149—October Term, 1950

No. 21667

THE RUBEROID Co., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

**Answer to Petition for Rehearing.**

Now comes the Federal Trade Commission, respondent in the above-captioned matter, and in answer to the petition for rehearing, answering says:

**PRELIMINARY STATEMENT.**

The petition for rehearing here is as devoid of substance and merit as was the petition to review and set aside or modify the



order to cease and desist, which invoked the jurisdiction of this court and resulted in the decision of June 4, 1951, affirming and enforcing the Commission's order.

In considering the petition for rehearing the court should keep in mind that petitions in this court to review and set aside Commission orders, at the instance of respondents before the Commission, stand upon entirely separate and distinct statutory provisions from the statutory provisions relating to applications for enforcement, at the instance of the Commission. This is a most important distinction and difference and one that petitioner has very carefully, studiously and skillfully ignored in its petition for rehearing.

Just as the petition for review filed by petitioner in this matter was based upon a misconception of the facts and the law, the petition for rehearing here is based upon (1) a misconception of the facts found by the Commission and affirmed by this court, and (2) a misconception of the applicable law and court decisions.

- (1) *There is no evidence in the record establishing the fact, nor is there any logical or normal inference flowing from the facts established by the record, that petitioner has discontinued or has any intention of discontinuing its unlawful method of selling its products.*

In the paragraph on page 8 of the petition for rehearing, beginning with the words "In this respect \* \* \*" petitioner attempts to give this court a factual basis to justify granting its prayer for rehearing and modifying the opinion of this court by striking therefrom the words "enforcement granted". Petitioner tells the court that the unlawful price discriminations occurred 10 years ago, resulted from certain discounts allowed locally for a short period of time in New Orleans to meet competitive conditions; that "it appears from the record that the discriminations had then ceased" and that "there was no evidence of violation, before or after 1941". This statement by petitioner is wholly inaccurate and can find no basis for support either in the record or in the Commission's finding as to the fact which this court has affirmed and which petitioner does not here question.

The Commission found that in the sale of its products petitioner engaged in unlawful price discriminations. This finding was neither restricted to time nor to locality. It is true, as it of necessity must be, that the examples of actual sales made showing this unlawful discrimination were limited as to time and locality. Such sales

were illustrative of petitioner's course of conduct in selling its products throughout the country. There is no evidence in the record that petitioner's sales method, as found by the Commission, was different in different localities; there is undisputed evidence in the record that from 1936 down to and including the year 1946 (the time of the hearing) petitioner's method of selling was as found by the Commission. There is not one scintilla of evidence establishing any local competitive condition which caused petitioner to sell to some customers at a lower price than to others. On the contrary, the record establishes the fact that the competitive conditions mentioned were a "surmise" on petitioner's part and could not be established by proof. There is no evidence of any nature in the record that petitioner, during the hearings before the Commission, had discontinued its unlawful conduct or even intended to discontinue such conduct. As a matter of fact, the evidence in the record establishes the fact that petitioner at the time of the hearing was selling its products of like grade and quality to some customers at a lower price than to other customers.

Since petitioner elected not to introduce any evidence showing that its price discriminations were justified by cost or were made in good faith to meet competition; or evidence that such price discriminations were restricted as to area and ~~as to~~ time and not a pattern of its sales plan throughout the country; or evidence that it had discontinued such practices, then the facts established by the Commission in this record and the logical inferences flowing therefrom which formed a basis for the Commission's finding as to the fact, which this court affirmed, stands. The record is that petitioner is engaged in unlawful price discriminations in the sale and distribution of its products; that the record is devoid of evidence that petitioner has discontinued this method of sale; and, implicit in petitioner filing its petition to review asking this court to set aside the order, on the ground that it was illegal or, in the alternative, asking this court to so modify the order as to destroy its effectiveness, petitioner asserted its right to continue its method of selling its products. A method which this court found to be unlawful. This record as thus established can not now be changed by the *ipsi dixit* of petitioner's attorney.

Further than this, it is more than significant that at no time, neither in petitioner's brief, nor in its reply brief, nor in its oral argument before this court, nor in the petition for rehearing—does petitioner state in plain simple language that it has discontinued its unlawful conduct. We therefore submit that there is no factual basis established by this record here that would justify this court granting the petition for rehearing and modifying its opinion hand-

ed down on June 4, 1951, by striking therefrom the phrase "enforcement granted".

- (2) *The concluding paragraph of the Commission's brief praying that the petition for review be dismissed and that the court affirm and enforce the order is properly before this court in the nature of a cross petition.*

It has long been the practice of the Commission, where a petition for review has been filed, to include in the concluding paragraph of its briefs a prayer asking the court to dismiss the petition to review and enter a decree affirming and enforcing the Commission's order. This procedure has met with the approval of the courts. The concluding paragraph of the Commission's brief in the instant matter followed this practice. Petitioner raised no question as to this either in its reply brief or in its oral argument before this court. In its petition for rehearing (pp. 1-2) petitioner raises the question for the first time, contending that there was no cross petition for enforcement filed by the Commission and that the concluding paragraph of the Commission's brief "erroneously cited a provision of the Federal Trade Commission Act" presents no question under the Clayton Act. Even though conceding that a formal application in proceedings of this nature is not essential, it would appear that petitioner is here objecting to this court considering the concluding paragraph of the Commission's brief as a cross petition praying for enforcement.

It may be that the citation here referred to is not applicable in the instant matter, however, the Commission's authority for such citation can be found in the decision of the Third Circuit, *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 67 (1939). This case was before the court upon petition to review and set aside the Commission's order. It involved a violation of the Clayton Act, as amended, and came before the court upon petition to review and set aside the Commission's order. The court affirmed and enforced the Commission's order in the following language:

"A decree will be entered affirming the Commission's order and commanding the petitioner to obey it. See 15 U.S.C. 45, as amended."

Even though the citation may not be applicable, this would not vitiate the Commission's prayer for relief.

In *Electro-Thermo Co. v. Federal Trade Commission*, 91 F. 2d 477 (C.A. 9, 1937) a case arising upon petition to review an order of the Federal Trade Commission, the Commission did not file a separate pleading seeking enforcement of its order but merely prayed in the concluding paragraph of its brief (as in the instant

matter) that the petition to review be denied and the order affirmed and enforced. The court affirmed the Commission's order and a decree of enforcement was granted. In referring to the prayer in the Commission's brief, the court, speaking through Judge Denman, at pages 480-481, said:

"In its brief (and not otherwise) the Commission asks for a decree of affirmance and enforcement of its cease and desist order. Petitioner moved to strike the 'cross-petition' because it is not properly before us. Petitioner alleges that before a decree of enforcement can be granted it must appear that the recipient of the cease and desist order has disregarded it."

After quoting the Act, the court, at page 481, said:

"It would seem, in view of the statute, that the Commission's informal prayer for affirmance of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other."

The Commission therefore submits that the prayer for affirmance and enforcement in the concluding paragraph of the Commission's brief in the nature of a cross-petition is properly before this court.

- (3) *Where, under a petition to review and set aside the Commission's order, the court dismisses the petition and affirms the order, the Act does not require the Commission to prove a violation thereof before it is entitled to a decree of enforcement.*

A proceeding before the circuit court of appeals in cases of this kind is of an equitable nature<sup>1</sup> and the power granted the court over such orders is intended to be exercised somewhat as the courts review injunction proceedings.<sup>2</sup> The jurisdiction of the court is original and exclusive and not appellate,<sup>3</sup> and is purely statutory.

<sup>1</sup> *L.B. Silver Co. v. Federal Trade Commission*, 292 F. 752, (C.A. 6, 1923); *Butterick Co. et al v. Federal Trade Commission*, 4 F. 2d 910, (C.A. 2, 1925), cert. den. 267 U.S. 602 (1925); *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673 (C.A. 8, 1926).

<sup>2</sup> *Curtis Publishing Co. v. Federal Trade Commission*, 270 F. 881 (C.A. 3, Pa. 1920); cert. granted 256 U.S. 88 (1921), affirmed 260 U.S. 568 (1923); *Butterick Co. et al v. Federal Trade Commission*, 4 F. 2d 910 (C.A. 2, 1925).

<sup>3</sup> *T.C. Hearst & Son v. Federal Trade Commission*, 268 F. 874 (D. Ct. Va. 1920); *Butterick Co. et al v. Federal Trade Commission*, 4 F. 2d 910 (C.A. 2, 1925); *Educators Assn. v. Federal Trade Commission*, 108 F. 2d 470 (C.A. 2, 1939).



The Act provides two methods whereby jurisdiction over the final orders of the Commission can be acquired by the circuit courts of appeals, (1) on an application for enforcement filed by the Commission and; (2) on a petition to review and set aside the Commission's order filed by a respondent. Each is separate, distinct and independent of the other, seeking entirely different action by and asking entirely different affirmative relief from the courts and the jurisdictional requirements vary.

In the instant matter the jurisdiction of this court was invoked by petitioner under the following applicable provision of the Act: (Clayton Act, §11, 38 Stat. 734, 735; 15 USC. 21)

"Any party required by such order of the Commission \* \* \* to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission \* \* \* be set aside \* \* \*. \* \* \* Upon the filing of the transcript, the court shall have the same jurisdiction to affirm, set aside or modify the order of the Commission \* \* \* as in the case of an application by the Commission \* \* \* for the enforcement of its order \* \* \*."

The applicable provisions of the statute which govern application by the Commission for enforcement of its orders are as follows:

"If such person (against whom an order to cease and desist has been issued) fails or neglects to obey such order of the Commission \* \* \* while the same is in effect, the Commission \* \* \* may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission \* \* \*. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission \* \* \*."

It is clear from the provisions of the statute, therefore, that two separate procedure are provided by which this court's jurisdiction over the order of the Commission can be invoked. In one (which is applicable here) the question of violation is not raised. In the other (not applicable here) the statute specifically raises the question of

violation of the Commission's order and requires the Commission to prove such violation. The statute gives this court exactly the same jurisdiction and power in both instances. It is too well settled to require either argument or citation of authority that under the statute (Clayton Act, 15 U.S.C. 21) this court, on acquiring jurisdiction of the orders of the Commission, is empowered to review, enforce, set aside or modify the Commission's orders.

Relying upon *Federal Trade Commission v. Standard Education Society*, 14 F. 2d 947 (C.A. 7, 1926); *Federal Trade Commission v. Balme*, 23 F. 2d 615 (C.A. 2, 1928), cert. den. 277 U.S. 598; *Federal Trade Commission v. Herzog*, 150 F. 2d 450 (C.A. 2, 1945), and leaning heavily upon *L. B. Silver Co. v. Federal Trade Commission*, 292 Fed. 752 (C.A. 6, 1923); *Butterick Co. v. Federal Trade Commission*, 4 F. 2d 910 (C.A. 2, 1925), and *Federal Trade Commission v. Fairyfoot Products Co.*, 94 F. 2d 844 (C.A. 7, 1930), petitioner contends that upon affirmance of an order of the Commission a decree of compliance or enforcement will not issue except upon proof of violation or threats of violation. This contention is wholly without merit and petitioner can find no comfort or support in the authorities relied upon.

As we read the petition for rehearing, petitioner's argument is based, and it relies, upon cases arising under the provisions of the statute which we have heretofore indicated is separate and distinct from the statutory provisions governing the instant matter. Petitioner's reliance upon the *Standard Education*, *Balme*, and *Herzog* cases, and its letter addressed to the court dated June 27, 1951, in which it calls the court's attention to this court's decision in *Federal Trade Commission v. Standard Brands, Inc.* (a case involving a procedure under a section of the statute not applicable here) is a further indication of the fact that petitioner has an erroneous conception of the applicable provisions of the statute, and the decisions of the court, in reference to petitions to review and set aside the Commission's orders. The court is therefore not here concerned with, and should not give consideration to, the questions raised and the law applicable to a proceeding brought under provisions of the Act, not applicable here.

The question raised and the principles of law announced by this court in the *Standard Education*, *Balme*, *Herzog*, and *Standard Brands* cases relied upon by petitioner are not in point. Each of these cases involved an application by the Commission for enforcement under the provisions of the Act which specifically requires the Commission to prove a violation of its order before an enforcement decree will issue. No such requirement can be found in the provisions of the Act under which this proceeding was instituted and the court should not read such requirement into the Act as it must do if it grants the petition for rehearing.

Petitioner also relies upon the *Silver Company*, *Butterick*, and *Fairyfoot* cases in support of its position here. These cases are not in point, do not support petitioner's position here, and each can easily be distinguished from the instant matter.

In the *Silver* case the question of a decree of enforcement was raised not by cross-petition or by a prayer in the Commission's brief in the nature of a cross-petition, but upon a motion for recall of the court's mandate modifying and affirming the Commission's order as modified. In refusing to grant the motion, the court, at page 753, said:

"It does not necessarily follow that the court should take the same action upon a petition by respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for [the purpose of bringing the] question of enforcement properly before the court on cross-petition asking for enforcement]."

The court went on to say that the form of the court's order would depend upon whether its jurisdiction was appellate or original and if original (it is original and not appellate), the court would *naturally enter its own decree*, fixing the rights of the parties and, in such form the decree would be enforceable by the court.

The court further said, at page 754:

"\* \* \* the only substantial respect in which the *Silver Company* ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission [here obviously referring to the right of the Commission under the statute to file an application for enforcement and not referring to the petition for review which had already invoked the jurisdiction of the court] it has turned out that the *Silver Company* was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. \* \* \*"

In the *Butterick* case the court, at page 913, held that if the unlawful practices were being continued there would be an injunction—"\* \* \* but if whatever was unlawful, ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. \* \* \*"

The Court concluded its opinion in the *Butterick* case in the following language:

"Concluding, as we do, that the Commission's order was properly made, it is affirmed, and the respondent may have an order entered on its cross-petition."

How these cases can be of any comfort to petitioner here is beyond comprehension. The unlawful practices found by the Commission and affirmed by this court have not, insofar as the record before the court is concerned, ceased, but are now continuing, and as the Commission has heretofore stated, implicit in the petition for review petitioner has served notice that it intends to continue the unlawful practices until this court by a decree of enforcement compels it to discontinue such practices.

The *Fairyfoot* case is also distinguishable from the instant matter. There was no cross-petition filed, nor was there any prayer in the Commission's brief by nature of a cross-petition. The question of enforcement was raised by a petition filed by the Commission to show cause why the *Fairyfoot Company* should not be adjudged in contempt for violating the decree of the court affirming the Commission's order. This petition to show cause is similar to an application for enforcement and raises a question of fact, namely, whether the respondent had violated the Commission's order, a question not here raised.

In the *Fairyfoot* case, the court, at page 845, said:

"Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question."

This is so obvious a reference to procedures other than the type of procedure here involved that comment is unnecessary.

Not only do the cases relied upon by petitioner fail to support its position here, but the greater weight of the authorities are against it. On petitions to review the courts have uniformly enforced the Commission's orders, on the Commission's cross-petitions for enforcement, where no evidence whatever of violation of the orders was shown or even required. This court did so in—

*L & C Mayers Co., Inc., v. Federal Trade Commission*, 97 F. 2d 365 (C.A. 2 1938). (Petition to review under 15 USC 45, prior to 1938 amendment);



*Butterick Company v. Federal Trade Commission*, 4 F. 2d 910 (C.A. 1925), cert. den. 267 U.S. 602 (1925).

Other circuits which have granted enforcement decrees of valid orders of the Commission under the Clayton Act are as follows: *Signode Steel Strapping Company v. Federal Trade Commission*, 132 F. 2d 48, 54 (C.A. 4, 1942); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1, 1940); *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8, 1940); *Webb-Crawford v. Federal Trade Commission*, 109 F. 2d 268, 270 (C.A. 5, 1940), cert. den. 310 U.S. 638 (1940); *The Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 3, 1938), cert. den. 308 U.S. 625 (1940); *Q. R. S. Music Company v. Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7, 1926); *Oliver Brothers v. Federal Trade Commission*, 102 F. 2d, 763, 771 (C.A. 4, 1939).

Further than this, on at least three occasions this court has held that conduct violative of a Commission order which the court had simply affirmed without specifically commanding obedience thereto constituted contempt of court, once in *Biddle Purchasing Company v. Federal Trade Commission*, No. 15624, (order of June 5, 1941) not reported, and twice in *Leavitt v. Federal Trade Commission*, No. 9037 (orders of December 24, 1935, and February 4, 1929), not reported.

In *Federal Trade Commission v. Cement Institute, et al.*, 333 U.S. 683, the Supreme Court indicated that it was not necessary for the Commission to prove a violation of a valid order under a petition to review. The court said, at page 730: "The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order. It is so ordered." Also see *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

The Commission has made no attempt to answer each and every one of petitioner's contentions in its petition for rehearing since it is so obvious that such contentions are based upon facts not in the record and provisions of the statute and decisions of the courts not applicable. Petitioner contends, however, that it would be inconsistent to hold that where the Commission files a petition for enforcement the court will limit itself to the question of affirmance unless violation is proved, but if the respondent files its petition for review an injunction will follow affirmance, as a matter of course. Petitioner argues that such a rule would penalize respondent for applying to this court for a review of the Commission's order. There is no merit to this, and whether it is or is not inconsistent, as argued by petitioner here, is of no concern to this court. If petitioner actually feels that such a procedure would penalize it and places

an undue and unfair burden upon its shoulders, then, in the words of petitioner, such an argument "should be addressed to Congress, and not to this court".

The reason that the provision of the Act applicable here does not require proof of violation before a decree of enforcement is granted by the court is that when a respondent files a petition to review he is denying the validity of the order, asserting his right to continue the practice found to be unlawful, and evincing his intention to violate the order unless the court commands obedience. As this court said in *National Silver Company v. Federal Trade Commission*, 88 F. 2d 425, 428 (C.A. 2, 1937):

"Even if [the prohibited practice had been discontinued], since the petitioner asserts the legal right to use its misleading designation, it is the continuing duty of the Commission to issue, and of the court to affirm and enforce, an order to cease and desist. Here, there is no assurance that there would be a permanent discontinuance. \* \* \* A mere discontinuance of the unfair competition method is no defense, nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue."

#### CONCLUSION.

The record of the hearing, and the action of petitioner, before the Commission, establishes this case as one of the most flagrant unlawful price discrimination cases that the Commission has had before it. Further than this, petitioner's contention under its petition to review, and its further contentions under the petition for rehearing, can lead to but one conclusion; namely, that petitioner has no intention of complying with the Commission's order unless and until forced to do so. Petitioner deserves no further consideration from either this court or from the Commission. The Commission can not enforce its orders except through and by virtue of the power and authority of this court. A decree of enforcement carries no penalty or punishment. If petitioner is obeying the Commission's order, a decree of enforcement should be of little concern or interest to it. However, if petitioner is not obeying the Commission's order, or has not discontinued its unlawful practices, a decree of enforcement would have a most salutary effect. Petitioner, as its actions throughout this case indicate, is not overly concerned or worried about an order of the Commission, but petitioner is much concerned with, as the petition for rehearing indicates, and has the deepest respect for, a decree of this court making the Commission's order its own and commanding obedience thereto.

For all of the above reasons, the Commission finally submits that there is no merit to petitioner's position here, and the Commission prays the court to deny the petition for rehearing.

Respectfully submitted,

FEDERAL TRADE COMMISSION

By JNO. W. CARTER, JR.,  
*Acting Assistant General Counsel.*

July 4, 1951.

**Opinion.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950.

(Petition filed June 19, 1951)

Decided August 14, 1951.)

Docket No. 21667

THE RUBEROID Co., *Petitioner,*

*against*

FEDERAL TRADE COMMISSION, *Respondent.*

Before:

L. HAND, AUGUSTUS N. HAND and CLARK, *Circuit Judges.*

*On Rehearing*<sup>1</sup>

PER CURIAM:

When this appeal was first decided, our mandate was "Order affirmed; enforcement granted." Petitioner now seeks to have us amend our mandate by striking therefrom any reference to enforcement. In the original appeal, petitioner sought, as provided by 15 U. S. C. A. §21, to have us modify an order of the Federal Trade Commission ("FTC") by limiting its scope and by inserting therein certain defenses provided by the Clayton Act as amended, 15 U. S. C. A. §13 *et seq.* The order, based upon violations of the Clayton Act, *supra*, had been entered after a hearing at which petitioner introduced no evidence. Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to

<sup>1</sup> On written submission.

introduce in its defense evidence that the conduct complained of was permitted by exceptions contained in the Clayton Act itself as amended. This, as we understood its position, was substantially all the petitioner desired. The FTC, at the close of its brief on appeal, asked that the order be affirmed and that enforcement be granted, citing as authority for the latter request 15 U. S. C. A. §45 (c) which directs such a mandate if a petitioner seeks review of an order based on a violation of the FTC Act, 15 U. S. C. A. §41 *et seq.*, and fails to have such order set aside. Not only is no such provision found in 15 U. S. C. A. §21 which permits a petitioner to seek review of an order of the FTC based on a violation of the Clayton Act as amended, but it is settled that the FTC cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent, *F.T.C. v. Herzog*, 2 Cir., 150 F. 2d 450; *F.T.C. v. Balme*, 2 Cir., 23 F. 2d 615, cert. den. 277 U. S. 598; *F.T.C. v. Standard Brands*, 2 Cir., 189 F. 2d 510. Respondent asks that we treat the closing paragraph of its brief as a cross petition for enforcement of its order. Accepting *arguendo* the propriety of such a manoeuvre, we find unconvincing the FTC's reasons why, upon a cross-petition, it is not required to make the same showing of a threatened violation of its order as it must had it petitioned for enforcement. True, various cases have been cited to us where the courts have granted enforcement of an order when a petitioner has failed in its attempt to have the order set aside but, in no case prior to the one before us, so far as we can determine, has the petitioner objected to such a mandate. As we have indicated, the present petitioner did not deny that its original conduct violated the Act and there was uncontradicted evidence that the practice has been abandoned on which the FTC has not made a finding. Under such circumstances so much of our mandate as directed enforcement of the order was premature and should be stricken.

So ordered.

U.S.C.J.J.

CLARK, *Circuit Judge* (dissenting) :

I regret the modification now ordered in our previous opinion at the request, or afterthought, of the petitioner on rehearing; for it tends to fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one. Delay in enforcement was a reason for the reforms of the Federal Trade Commission Act of 1938, of which a chief one was direct and immediate effectiveness of orders where review was not sought and immediate enforcement, on affirmance, of orders brought before the court for review. 15 U. S. C.



§45(e), (g), and (l). Through some mischance this was not carried over in terms to cases under the Sherman Act where the Commission itself sought enforcement, 15 U. S. C. §21; and we have thought the more ancient law there applicable. *F. T. C. v. Herzog*, 2 Cir., 150 F. 2d 450; cf. *F. T. C. v. Standard Brands*, 2 Cir., 189 F. 2d 510, where there is no discussion of the issue. The *Herzog* case appears not to have won definitive support outside the circuit and possibly the point deserves reexamination in the light of the cases hereinafter cited.<sup>1</sup> But beyond the substantial difference in the statutory wording as to the two forms of proceeding,<sup>2</sup> there is a certain logical difference (whatever the practical realities) between the case where the Commission affirmatively seeks action against a delinquent and where a respondent petitions for review, thus affirming the validity of his own conduct and the invalidity of the Commission action. So the cases have consistently ruled that in the latter case the matter is ripe for full decision, and that two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished.

The cases in support of this proposition are too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate. The principle appears to apply also whether the Commission has cross-petitioned for enforcement, as in the cases cited in Group 1 hereinafter; or whether it has not, as in the cases cited in Group 2. See, e.g., the following

<sup>1</sup> Lack of extra-circuit support may perhaps be connected with the changing trend, from an early heavy burden upon the Commission to show violation of its order, *F. T. C. v. Standard Education Society*, 7 Cir., 14 F. 2d 947, down through various cases, even before the amendment of 1938, which in substance placed a burden on the respondent to show that he no longer was doing the questioned acts or asserting the right to do so. See, e.g., *National Silver Co. v. F. T. C.*, 2 Cir., 88 F. 2d 425, 428; *F. T. C. v. Wallace*, 8 Cir., 75 F. 2d 733; *F. T. C. v. Goodyear Co.*, 6 Cir., 45 F. 2d 70; *F. T. C. v. Baltimore Paint & Color Works* 4 Cir., 41 F. 2d 474; *F. T. C. v. Morrissey*, 7 Cir., 47 F. 2d 101, cf. *Butterick Co. v. F. T. C.*, 2 Cir., 4 F. 2d 910, 913. Under such a rule what the petitioner can hope to obtain by the present maneuver is little indeed.

<sup>2</sup> Compare 15 U. S. C. §21, 3d paragraph, "*If such person fails or neglects to obey such order*" (italics supplied) the Commission may apply to a court of appeals for enforcement of its order, with the 4th paragraph, beginning, "Any party required by such order of the Commission \* \* \* to cease and desist from a violation charged" may obtain a court review by filing its petition, and continuing that upon the filing of a transcript of the record by the Commission "the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission \* \* \* as in the case of an application by the Commission \* \* \* for the enforcement of its order."

eases in Group 1: *Elizabeth Arden, Inc. v. F. T. C.*, 2 Cir., 156 F. 2d 132, certiorari denied 331 U. S. 806; *Southgate Brokerage Co. v. F. T. C.*, 4 Cir., 150 F. 2d 607, certiorari denied 326 U. S. 774; *Modern Marketing Service v. F. T. C.*, 7 Cir., 149 F. 2d 970; *Signode Steel Strapping Co. v. F. T. C.*, 4 Cir., 132 F. 2d 48; *Webb-Crawford Co. v. F. T. C.*, 5 Cir., 109 F. 2d 268, certiorari denied 310 U. S. 638; *Oliver Bros. v. F. T. C.*, 4 Cir., 102 F. 2d 763. And the following cases in Group 2: *E. B. Muller & Co. v. F. T. C.*, 6 Cir., 142 F. 2d 511; *Quality Bakers of America v. F. T. C.*, 1 Cir., 114 F. 2d 393; *Carter Carburetor Corp. v. F. T. C.*, 8 Cir., 112 F. 2d 722; *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 3 Cir., 106 F. 2d 667, certiorari denied 308 U. S. 625. Moreover, the Supreme Court itself has granted enforcement under like circumstances, both on cross-petition, *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760 (cf. below, *A. E. Staley Mfg. Co. v. F. T. C.*, 7 Cir., 144 F. 2d 221, 222), or, so far as appears, without such petition. *F. T. C. v. Cement Institute* 33 U. S. 683, 730.

In view of this number and weight of authority, petitioner had indeed hardihood to raise the issue; and our decision herein must promote confusion in view of our earlier rulings.<sup>3</sup> At the very least, since the Act is at most ambiguous on our exact point, we have a choice permitting us to follow the cases in the newer and more direct procedure, rather than choosing to tie up commission practice with merely repetitious hearings which can do even the petitioner no good except for the everlasting hope of mischance from a surfeit of judicial proceedings.<sup>4</sup> I would deny the petition.

\* \* \* \* \*

Although I do not view it as in any way determinative, I do feel that the opinion is seriously in error in the suggestion of uncontradicted evidence "that the petitioner's practice had been abandoned." This is violently controverted by the Commission. As I read the evidence, it was to the effect that while the war did bring about "radical changes" yet at the time of the hearing in 1946 there was still discount to "wholesalers" and "applicators" in New Orleans, claimed to be "because of Competitive conditions"—a point obviously productive of dispute until and unless settled by supportable findings.

<sup>4</sup>One may indeed wonder how much of practical usable law the petitioner has secured. The Commission has referred us to several unreported decisions of ours where we have upheld contempt proceedings without enforcement on top of affirmance, and the wisdom of venturing a violation for lack of Pelion on Ossa might well seem doubtful. A court even moderately jealous of its own dignity might well gag at overlooking planned violation of its own order of affirmance, merely because the latter lacked the two mystic words: "Enforcement granted."

United States Court of Appeals  
Second Circuit  
Filed Aug 14 1951  
Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

THE RUBEROID CO.

v.

FEDERAL TRADE COMMISSION

Order.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of August, one thousand nine hundred and fifty-one.

Present:

HON. AUGUST N. HAND,  
HON. CHARLES E. CLARK,  
HON. LEARNED HAND,

*Circuit Judges.*

THE RUBEROID CO., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, *Respondent.*

A petition for a rehearing having been filed herein by counsel for the Petitioner,

Upon consideration thereof, it is

Ordered that so much of the decision as directed enforcement of the order was premature and should be stricken.

ALEXANDER M. BELL,  
*Clerk*

United States Court of Appeals  
Second Circuit  
Filed Sep 4 1951  
Alexander M. Bell, Clerk

IN THE  
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE RUBEROID CO., *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Docket No. 21667

-- Final Decree.

The Ruberoid Co., petitioner herein, having filed in this Court on April 25, 1950, its petition to review and set aside an order to cease and desist issued January 20, 1950, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of The Ruberoid Co., a corporation; Docket No. 5017"; and said petition having been served upon respondent; and respondent having thereafter certified and filed herein as required by Section 11 of the Clayton Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument; and this Court having rendered its decision on June 4, 1950, affirming and granting enforcement of the said order of the Commission; and petitioner thereafter having duly petitioned this Court for rehearing as to whether the decree to be entered herein should enjoin petitioner from violating the provisions of said order of the Commission or should be limited to affirmance thereof, and the Court having fully considered the matter upon said petitions for review and for rehearing, it is hereby

ORDERED, that the said petition for rehearing be, and the same hereby is, granted: and that the opinion and decision of this Court filed herein on June 4, 1951, be revised by striking out the words "for appropriate enforcement" in the last sentence of the opinion, and by striking the words "enforcement granted" from the decision, so that the same shall read "Order affirmed"; and it is further



ORDERED, ADJUDGED AND DECREED, that the order to cease and desist issued by the Federal Trade Commission against petitioner on January 20, 1950, in a proceeding before said Commission entitled "In the Matter of The Ruberoid Co., a corporation, Docket No. 5017", be, and the same hereby is, affirmed. Dated, August 30, 1951.

AUGUSTUS N. HAND

L. HAND

*United States Circuit Judges.*

Filed: September 5, 1941

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing papers, numbered from I-VII & 1- to 198, inclusive, contain a true and complete manuscript of printed portions of the record and proceedings had in said Court, in the case of

THE RUBEROID Co., *Petitioner,*

*against*

FEDERAL TRADE COMMISSION, *Respondent.*

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this  
day of \_\_\_\_\_ in the year of our  
Lord one thousand nine hundred and fifty-one, and  
of the Independence of the said United States the  
one hundred and seventy-sixth.

SEAL

ALEXANDER M. BELL, *Clerk.*

United States Court of Appeals

Second Circuit

Filed Nov 1 1951

Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

RUBEROID COMPANY

v.

FEDERAL TRADE COMMISSION

**Order.**

At a Stated Term of the United States Court of Appeals, in and for the Second District, held at the United States Court House, in the City of New York, on the 1st day of November, one thousand nine hundred and fifty-one.

Present: HON. AUGUSTUS N. HAND, *Circuit Judge.*

RUBEROID COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

An application having been made herein by counsel for the respondent to authorize the Clerk of this Court to transmit the original transcript of record in this case to the Supreme Court of the United States for use in connection with the petition for a writ of certiorari,

Upon consideration thereof, it is

Ordered that the said application be and it hereby is granted.

Further ordered that the Solicitor General do whatever is necessary to effect the return of said record to this Court on completion of the case in the Supreme Court of the United States.

AUGUSTUS N. HAND

*U.S.C.J.*

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July 10, 1951.

The HONORABLE LEARNED HAND, AUGUSTUS N. HAND and CHARLES  
E. CLARK, Circuit Judges.  
United States Court of Appeals for the Second Circuit,  
Federal Courts Building,  
New York 7, New York.

Re: The Ruberoid Co. v. Federal Trade Commission, No. 149,  
October Term, 1950—On Petition for Rehearing

Dear SIRs:

The Answer filed herein by the Commission abounds with reckless and extravagant statements which we cannot allow to pass unchallenged. Some of these statements are directly contrary to the facts of record. We deem it our duty to call this to the Court's attention, and hope that a brief reply in this form will be accepted.

The Commission takes the unwarranted position that "implicit in the petition for review the petitioner has served notice that it intends to continue the unlawful practices", and that "when a respondent files a petition to review he is \* \* \* evincing his intention to violate the order unless the court commands obedience". If that were true, then every defendant who contests an injunction suit would be presumed to be continuing or threatening the unlawful practice charged, regardless of factual evidence of prior discontinuance. The presumption, if any, should be that petitioner discontinued the practices found unlawful after they were called to its attention and that it has thenceforth complied with the Act and with this order. Here, however, petitioner does not have to rely on presumptions.

The record affirmatively shows that the price discriminations found by the Commission had been wholly discontinued prior to the hearings in this case in 1946, more than four years before the issuance of the order. The Commission's assertions to the contrary are at variance with the undisputed evidence, and calculated to mislead the Court as to the facts.

Mr. O'Leary was questioned at length by the Commission's attorney as to petitioner's pricing policies in 1946, both in New Orleans and elsewhere (fols. 97-105). It will be recalled that the discriminations in 1941 resulted from the allowance of wholesaler discounts to four dealers in New Orleans who functioned as retailers or applicators, which discounts were not granted other retailers and applicators. Mr. O'Leary testified that these discriminations had been eliminated by restricting sales in New Orleans to five customers and by the adoption of a one price policy, selling to all at the same discounts regardless of whether they functioned as



wholesalers, retailers or applicators and regardless of quantities purchased. It appears further that petitioner's pricing policies in New Orleans both in 1941 and 1946 were formulated to meet local competitive conditions and were not indicative of its pricing elsewhere. Mr. O'Leary testified that in other territories petitioner observed the functional distinction between wholesalers and retailers and allowed the wholesale discount only to recognized wholesalers. This testimony directly contradicts the statements regarding the record made on page 3 of the Commission's answer. The fact is that the unlawful discriminations found were discontinued prior to 1946, did not exist outside of New Orleans, and have never been resumed. The assertion that this case was "one of the most flagrant" price discrimination cases the Commission ever had, is, of course, absurd.

This order in terms prohibits any price differential between competing purchasers, whether the differential is lawful or unlawful. The Court has refused to modify the order, but has assured petitioner that in the event of a subsequent enforcement proceeding it will not be construed as prohibiting differentials which the statute expressly permits. It is not clear that the Commission accepts this construction. The Commission now states that "the evidence in the record establishes \* \* \* that petitioner at the time of the hearing was selling its products of like grade and quality to some customers at a lower price than to other customers". The indication is that the Commission's attorneys still regard any differential as unlawful. Petitioner believes that there is a real danger that if the court now grants enforcement it may be subjected to the publicity of a contempt proceeding on account of using price differentials falling within the provisos of the Act.

The Commission asserts that the statutory provisions as to enforcement have no application here, and relies solely upon the provisions permitting petition for review (which do not mention enforcement). Its position is that if the respondent petitions for review and the order is affirmed, the Commission should have an injunction upon request, even though it would not be entitled to such relief upon its own petition.

Where a petition for review is filed by the respondent named in the order, the question of prior violation of the order does not arise unless the Commission files a cross-petition or otherwise applies for enforcement. If the Commission does ask enforcement, then both the issue of affirmance and the issue of enforcement are presented and the court's jurisdiction is exactly the same as if the Commission had originally applied for enforcement. Where the question has been presented the courts have consistently refused to grant enforcement if it appears that the forbidden practices were abandoned upon or prior to the issuance of the order and there is no

threat of renewal. The Commission has cited no case to the contrary.

In the *Cement Institute* case, cited by the Commission, the cement companies openly and admittedly continued their multiple basing point system until the case reached the Supreme Court. That case stands upon the same footing as the *Bu. brick* case in this court.

In *Electro-Thermo Co. v. F. T. C.* (91 F. 2d 477), the opinion shows that the court, while asserting its plenary jurisdiction, granted only affirmance and not enforcement.

In *National Silver Co. v. F. T. C.* (88 F. 2d 425) this Court granted enforcement because the petitioner came before it asserting the legal right to continue the false advertising prohibited by the order. Here petitioner conceded the illegality of the price differentials which the Commission found, and discontinued them long before the order was issued.

There are, of course, a number of cases where the Commission has applied for and obtained court enforcement without opposition.

At the end of its brief the Commission asked for an enforcement order upon authority of an inapplicable provision of the Federal Trade Commission Act as amended. It now attempts to justify this upon the ground that it apparently succeeded in misleading the Third Circuit into granting enforcement in reliance upon the same inapplicable provision in *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. 2d 67.

We do not question the jurisdiction of the court; and it is immaterial whether the request in the Commission's brief be considered sufficient as a cross-petition. We do submit that the Commission is entitled to no greater or different relief upon a petition for review and cross-petition for enforcement than if the proceeding had originated upon an application for enforcement. To hold otherwise would do violence to the language of the Act. The questions of affirmance and enforcement are equally presented, and the court's jurisdiction is the same, in either case.

Respectfully yours,

AUSTIN & MALKAN,  
Attorneys for Petitioner.

By CYRUS AUSTIN.

CA:gks

Clerk's Certificate to the foregoing transcript omitted in printing.

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Supreme Court of the United States

No. —, October Term, 1951.

[Title omitted.]

*Order extending time to file petition for writ of certiorari*

November 23, 1951

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 28, 1951.

(S) ROBERT H. JACKSON,

*Associate Justice of the Supreme  
Court of the United States.*

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Supreme Court of the United States

No. 448, October Term, 1951

[Title omitted.]

*Order allowing certiorari*

Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

No. 504, October Term, 1951

[Title omitted.]

*Order allowing certiorari*

Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.



132 FEDERAL TRADE COMMISSION VS. THE RUBEROID CO.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

193 In the Supreme Court of the United States

October Term, 1951

[Title omitted.]

*Stipulation*

Filed February 6, 1952.

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of hearing and determining the cases on the merits, the printed record shall consist of the printed record on the petitions for writs of certiorari.

It is further stipulated and agreed that either of the parties may refer in briefs and argument to the original transcript of record on file in this Court, including any part thereof which has not been printed.

PHILIP B. PERLMAN,  
*Solicitor General,*  
*Counsel for Petitioner in No. 448.*

CYRUS AUSTIN,  
*Counsel for Petitioner in No. 504.*

ARY  
SUPREME COURT, U.S.

No. 448

Office Supreme Court, U. S.  
FILED

NOV 26 1951

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**In the Supreme Court of the United States**

OCTOBER TERM, 1951

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FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID CO.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1951.

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No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID Co.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

---

The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above-entitled case on September 5, 1951: /

## OPINION BELOW

The opinion of the court of appeals (R. 153) is reported at 189 F. 2d 893. The opinion on rehearing (R. 176) is reported at 191 F. 2d 294.

## JURISDICTION

The judgment of the court of appeals was entered on September 5, 1951 (R. 181-182). The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254 (1).

## QUESTION PRESENTED

Whether, in a suit under Section 11 of the Clayton Act to set aside an order issued by the Federal Trade Commission under Section 2 of the Act, the court, having upheld the validity of the Commission's order, was thereupon bound to give it effect by commanding obedience thereto, or whether, as the court below held, it was incumbent upon the Commission to show affirmatively that the party attacking the order had failed to comply with it.

## STATUTE INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended by Public Law 899, 81st Cong., 2d Sess., 15 U.S.C., Supp. IV, 21, provides in part:

\* \* \* \*

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the plead-

ings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition

praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. \* \* \*

#### STATEMENT

On July 26, 1943, the Federal Trade Commission issued a complaint against respondent pursuant to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13. The complaint charged unlawful price discrimination by respondent in its interstate sales of certain roofing and insulating material, and that the effect of the price discrimination had been, or might be, sub-



stantially to lessen competition among purchasers from respondent (R. 2-6). Respondent's answer admitted that many of its customers were in competition with each other, and that it granted wholesalers a greater discount than that granted retailers and "applicators" (R. 9-10). But it denied that it discriminated and that its practices were or might be injurious to competition, and it affirmatively pleaded that its price differentials were justified by cost factors, or were made in good faith to meet competition (R. 10).

After hearings before a trial examiner (R. 11-94), the filing of the examiner's recommended decision (R. 95), and exceptions thereto (R. 129), the matter was presented to the Commission on briefs and oral argument. The Commission made its findings of fact (R. 144-149), concluded that respondent's practices were unlawful (R. 150), and issued an order directing it to cease and desist from discriminating in price—

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. [R. 151-152.]

Respondent thereafter filed in the court below a petition to set aside or to modify the order (R. 153). It did not deny that the Commission's find-

<sup>1</sup> "Applicators" refers to roofing contractors who applied Ruberoid products on contract jobs for which they were paid as a whole (R. 154).

ings were supported by evidence and it did not seriously contest issuance of some form of order against it, but contended that the order was too broad and that it should accordingly be set aside or, alternatively, reframed so as to include certain exemptions and provisos (R. 154-155). Overruling these contentions, the court unanimously held that the order was within the Commission's authority and that the order "must therefore stand, for appropriate enforcement" (R. 155-157). The final line of the court's opinion reads: "Order affirmed; enforcement granted" (R. 157).

Respondent filed a timely petition for rehearing, directed solely to the question of enforcement (R. 158), urging that a party affected by a cease and desist order may challenge its validity or scope by petitioning for review "without subjecting itself to a court injunction" (R. 159). The court held that if the Commission had initiated the judicial proceedings by applying for enforcement, it would have been obliged to show non-compliance with the order, and that there is no convincing reason why the Commission should not be "required to make the same showing" of a need for enforcement in a proceeding brought by the private party to set aside the order (R. 177). The court also said that there was "uncontradicted evidence" that the practice against which the Commission's order was directed "has been abandoned" (*ibid.*).

Judge Clark, dissenting, stated that the cases

have consistently ruled "that two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished" (R. 178); that "in view of this number and weight of authority, petitioner had indeed hardihood to raise the issue" (R. 179); and that the court's holding would "tie up commission practice with merely repetitious hearings" (*ibid.*), tending "to fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one" (R. 177).

#### SPECIFICATIONS OF ERRORS TO BE URGED

The court of appeals erred—

- (1) In failing to grant enforcement of the order which it duly affirmed.
- (2) In holding that the Commission was not entitled to enforcement of the order in the absence of a showing of non-compliance.
- (3) In concluding that there was evidence of abandonment of the illegal practices prohibited by the order.

#### REASONS FOR GRANTING THE WRIT

1. A Commission order issued under authority of the Clayton Act is "only informative and advisory" until there is impressed upon it the seal of judicial authority. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 432. Congress provided that the circuit courts of appeals should act as courts of first instance in respect of Commission orders, a provision designed to assure "the speedi-

est settlement of disputed questions.”<sup>2</sup> Under the statute, the Commission's orders come before courts of appeals in one of two ways, (1) on an application for enforcement filed by the Commission or (2) on a petition to review filed by the private party affected. The jurisdictional prerequisites of the two proceedings are not, however, precisely the same.

The paragraph of Section 11 relating to applications by the Commission to the court begins with the words: “If such person [the private party directed to cease and desist] fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals \* \* \* for the enforcement of its order \* \* \*.” The paragraph, after providing for the filing of the administrative record, goes on to declare that the court shall have power to enter a decree “affirming, modifying, or setting aside” the order of the Commission. (See *supra*, pp. 2-3.)

<sup>2</sup> The quoted language appears in the Conference Report on the Federal Trade Commission Act, H. Rep. No. 1142, 63rd Cong., 2nd Sess., p. 19. The enforcement provisions of Section 5 of the original Federal Trade Commission Act (38 Stat. 719) are virtually identical with those of the Clayton Act, and the two statutes were enacted and approved within a few weeks of one another.

Further evidence that the Congress intended to make Commission procedures prompt and effective is found in the fact that both Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act (*supra*, p. 4) provided that “proceedings in the United States Court of Appeals shall be given precedence over cases pending therein, and shall be in every way expedited.”



The succeeding paragraph of Section 11 relating to petitions to review (*supra*, pp. 3-4) contains no "if" clause. Under its language, compliance or non-compliance with the Commission's order is wholly immaterial. ~~It~~ provides: "Any party" against whom the Commission has entered an order "may obtain a review" thereof by filing with the court a petition for review. This petition is to be served upon the Commission, which shall thereupon file with the court a transcript of the administrative record. It is provided that, upon the filing of this transcript, the court shall have "the same jurisdiction to affirm, set aside, or modify" the order of the Commission "as in the case of an application by the Commission or Board for the enforcement of its order." The paragraph which immediately follows reads (*supra*, p. 4):

The jurisdiction of the United States court of appeals to *enforce*, set aside, or modify orders of the Commission or Board shall be exclusive.

We submit that in a suit for review brought by a private party the court clearly has the power and duty to enforce it if it upholds the validity of the Commission's order. While the paragraph providing for such review states that the court has jurisdiction to "affirm," set aside, or modify, it is clear that "affirm" here means enforce. The preceding paragraph providing for suits by the Commission for "enforcement" of its orders uses the same language. And the statute expressly declares

that in a private-party review proceeding the court shall have "the same jurisdiction" as in an "enforcement" proceeding by the Commission. Furthermore, the paragraph which follows the two paragraphs authorizing proceedings by the Commission and proceedings by private parties declares that in such proceedings the jurisdiction of the courts of appeals "to enforce, set aside, or modify" orders of the Commission shall be exclusive.

Cases arising under the enforcement provisions of the National Labor Relations Act confirm the conclusion that the court below erred in denying effectiveness to a valid order which Congress gave it the exclusive power to enforce. Section 10(e) of that Act (29 U.S.C. 160(e)), which was largely modeled on the provisions of the Federal Trade Commission Act,<sup>3</sup> states that the court of appeals "shall have power to grant \* \* \* a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." The power thereby given to enforce orders found to be valid has been held to impose the duty to enforce such orders. *National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U.S. 563. This Court there said (pp. 567, 568) that "the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree," and that the Act "does not require the Board to play hide-and-seek with those guilty of unfair labor

<sup>3</sup> See Conference Report on National Labor Relations Act (H. Rep. No. 1371, 74th Cong., 1st Sess.), p. 5.

practices." See also *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 230; *National Labor Relations Board v. General Motors Corp.*, 179 F. 2d 221, 222 (C.A. 2).

Here, also, the court, having power to enforce, had the duty to enforce, irrespective of compliance or non-compliance with the Commission's order by the party to whom the commands were directed.

Uniform judicial practice confirms the view that, in review proceedings brought by private parties under Section 11 of the Clayton Act, the power and duty to "affirm" is a power and duty to enforce. In such cases the courts, to the extent that they have found the Commission's orders valid, have regularly commanded obedience thereto.<sup>4</sup> En-

<sup>4</sup> *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 730; *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 760; *Judson L. Thomson Mfg. Co. v. Federal Trade Commission*, 150 F. 2d 952 (C.A. 1); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1); *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2); *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378, 380 (C.A. 2); *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 3); *Southgate Brokerage Co., Inc. v. Federal Trade Commission*, 150 F. 2d 607 (C.A. 4); *Signode Steel Strapping Co. v. Federal Trade Commission*, 132 F. 2d 48, 54 (C.A. 4); *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 771 (C.A. 4); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (C.A. 6); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970, 980 (C.A. 7); *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 212, 221 (C.A. 7), affirmed, 324 U.S. 726; *The Q. R. S. Music Company v. Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7); *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8).

There are contrary dicta in *Butterick Co. v. Federal Trade Commission*, 4 F. 2d 910, 913 (C.A. 2), certiorari denied, 267

enforcement has been thus granted both by this Court and by the courts of appeals in all circuits in which the issue has been presented. And although this settled practice has generally not been discussed in the opinions, the cases which support it are, as Judge Clark stated in the court below, "too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate" (R. 178).

In cases instituted by the Commission under Section 11, it has been held that, because of the initial "if" clause in the paragraph authorizing such proceedings, non-compliance with the order is a prerequisite to enforcement. See *Federal Trade Commission v. Jack Herzog & Co.*, 150 F. 2d 450 (C.A. 2); *Federal Trade Commission v. Baltimore Paint & Color Works, Inc.*, 41 F. 2d 474 (C.A. 4); *Federal Trade Commission v. Morrissey*, 47 F. 2d 101 (C.A. 7).<sup>5</sup> But there is rational basis for im-

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U.S. 602, and *Federal Trade Commission v. Fairyfoot Products Co.*, 94 F. 2d 844, 846 (C.A. 7), and an early decision contrary to the usual practice in *L. B. Silver Co. v. Federal Trade Commission*, 292 Fed. 752 (C.A. 6).<sup>5</sup> But cf. *Bear Mill Mfg. Co., Inc. v. Federal Trade Commission*, 98 F. 2d 67, 68 (C.A. 2) and *L. & C. Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365, 367 (C.A. 2).

The cases upon which the court below relied (*Federal Trade Commission v. Herzog*, 150 F. 2d 450 (C.A. 2); *Federal Trade Commission v. Balme*, 23 F. 2d 615 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (C.A. 2)), are all cases in which the judicial proceedings were initiated by Commission application for enforcement.

<sup>5</sup> While the cases have treated the question of non-compliance as judicially reviewable, it is doubtful whether the matter should be so regarded. The closely comparable provision in Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)



position by Congress of this limitation when the Commission applies for enforcement, without imposing a like limitation when those against whom cease and desist orders have been issued apply for judicial review.

Congress may well have believed that, unless there was some evidence of disobedience, the Commission had no occasion to go to the courts for enforcement of its orders. If the Commission took its orders to court even though there had been no indication of disobedience, the judiciary might be seriously and unnecessarily burdened. But the situation is altogether different where a private party, desirous of continuing the practice found illegal, elects to contest the order, and by that act compels the court to exercise its reviewing powers. If on such review the order is held to be valid, there is no reason to withhold judicial enforcement. Not to enforce means that, although a live controversy between the Commission and the party ordered to cease and desist has been judicially determined in the Commission's favor, the private party is nonetheless left free to flout the order which the court has upheld. For one thing, such a result detracts from the dignity of the courts.<sup>6</sup> And Congress,

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authorizing the Commission to issue a complaint if it has "reason to believe" that a person is violating the law, has been held non-reviewable. *Hills Brothers v. Federal Trade Commission*, 9 F. 2d 481, 483-4 (C.A. 9), certiorari denied, 270 U.S. 662.

<sup>6</sup> Judge Clark observed in this connection: "A court even moderately jealous of its own dignity might well gag at overlooking planned violation of its own order of affirmance merely because the latter lacked the two mystic words: 'Enforcement granted'" (R. 179).

which declared that disputed Commission orders should receive "speediest settlement" (*supra*, pp. 7-8) and that judicial proceedings involving such orders should take precedence over other cases (*supra*, p. 7<sup>W</sup>), certainly did not intend that the court's approval of an order should be sterile, that it should have no more standing than a purely advisory opinion, and that its effectiveness should be made to depend upon the initiation of still further proceedings.

We submit that the question of enforcement turns on the court's powers and duties when a proceeding is brought under the paragraph of Section 11 authorizing private parties to obtain judicial review of Commission orders. We further submit that the court below decided the question of enforcement, not on this basis, but on the basis of its powers and duties when a proceeding is brought under the paragraph authorizing the Commission to apply to the courts for enforcement of its orders. The court below referred to the fact that the Commission had requested it to treat the prayer for enforcement, made at the close of the Commission's brief, as a cross-petition for enforcement (R. 177). The court denied enforcement because it concluded that the condition (non-compliance), applicable when the Commission initiates the proceeding, is equally a condition when it files a cross-petition for enforcement. The only authorities which the court cited were cases in which the Commission had initiated the proceeding (see note 4, *supra*, p. 12).

The court below also stated that there was "uncontradicted evidence" that the respondent had abandoned the practices prohibited by the Commission's order (R. 177). Since the court's duty to enforce was not conditional upon respondent's non-compliance with the Commission's order, the court's statement, even if correct, is immaterial. We also point out that a proceeding under Section 11 of the Clayton Act is not rendered moot by reason of abandonment of the practices prohibited by the Commission's order. *Federal Trade Commission v. Goodyear Co.*, 304 U.S. 257.<sup>7</sup> In addition, the Government disputes the accuracy of the statement as to what the record shows with respect to abandonment.

At the evidentiary hearing in 1946<sup>8</sup> respondent sought to justify its challenged discount practices, and it made no contention that these practices had been discontinued. This claim was first advanced in respondent's petition for rehearing, filed with the court below on June 19, 1951. It was there stated, without a single record reference, that "it appears from the record" that when the case was tried in 1946 respondent's discriminations had ceased (R. 163).

<sup>7</sup> It is well settled that an order issued by the Commission under the Federal Trade Commission Act will be enforced even though the practices thereby prohibited had been discontinued prior to issuance of the Commission's order. See *Galter v. Federal Trade Commission*, 186 F. 2d 810 (C.A. 7), certiorari denied, October 8, 1951 (No. 93, this Term), and cases cited in Government's brief in opposition to certiorari in the *Galter* case, note 4, pp. 6-7.

<sup>8</sup> No evidence was taken after 1946, although the record was not formally closed until June 7, 1948 (R. 11, 96).

The specific violations which the Commission found related to the year 1941, but the Commission was under no obligation to multiply its proof by introducing evidence of continued violations of the kind shown by its evidence. Furthermore, the testimony of respondent's sales manager clearly indicates that at that time respondent had not abandoned its discount practices.<sup>9</sup> And Judge Clark, who wrote the court's opinion upholding the validity of the Commission's order (R. 153), stated in his dissent from the court's ruling on rehearing that, although in his view abandonment was not "in any way determinative" of enforcement, he believed that the majority was "seriously in error" in stating that there was uncontradicted evidence of abandonment (R. 179).

2. Under the ruling by the court below, in many instances there would have to be four separate proceedings before a party guilty of price discrimination or other violation of the Clayton Act could be brought to book: (1) an administrative proceeding heard on complaint of the Commission; (2) a proceeding before the court of appeals on petition to review; (3) a further proceeding before the court to obtain an enforcement order; and (4) a contempt proceeding. Section 2, as amended by the Robinson-Patman Act, is the basis for numerous Commission proceedings and orders of broad economic significance. Moreover, the ruling below equally applies to proceedings to review orders is-

<sup>9</sup> R. 11-42, 71-74, especially R. 13, 17-20, 23, 28, 32-33, 73.



sued by the Commission under the other sections of the Clayton Act which it is authorized to enforce (Sections 3, 7 and 8, 15 U.S.C. 14, 18, 19).

We submit that the decision below is in direct conflict with decisions both of this Court and of courts of appeals in other circuits directing enforcement of orders of the Commission whose validity had been upheld in review proceedings instituted by private parties under Section 11 of the Clayton Act. But if the Court should view the conflict of decision as somewhat muted because of the paucity of judicial discussion of the question of enforcement in the cases granting enforcement, then the case presents an important question of federal law which has not been, but should be, settled by this Court. Successful enforcement of the Clayton Act depends in large measure upon the promptness with which its prohibitions are enforced, and the decision below seriously militates against effective application of the Act.

#### CONCLUSION

The decision on rehearing below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and involves an important question of federal law. It is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

NOVEMBER 1951.

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No. 448

*In the Supreme Court of the United States*

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 448

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE RUBEROID CO.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE FEDERAL TRADE COMMISSION

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## OPINIONS BELOW

The opinion of the Court of Appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

## JURISDICTION

The decree of the Court of Appeals was entered on September 5, 1951 (R. 123-124). The petition for a writ of certiorari was filed on November 26, 1951, and was granted on January 28, 1952 (R. 131). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1). 

### QUESTION PRESENTED

The Federal Trade Commission, after appropriate proceedings, issued an order pursuant to Section 2 of the Clayton Act, directing Ruberoid to cease and desist from certain discriminatory pricing practices. Ruberoid filed a petition in the Court of Appeals under Section 11 of the Act to set aside or to modify the order. The court affirmed the order, but refused the Commission's request that it be enforced.

The question presented is whether the court erred in failing to enforce the Commission's order.

### STATUTE INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended by Public Law 899, 81st Cong., 2d Sess., 15 U. S. C., Supp. IV, 21, provides in part:

\* \* \* \*

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and

transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, ex-



cept that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28, United States Code.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. \* \* \*

## STATEMENT

On July 26, 1943, the Federal Trade Commission issued a complaint against Ruberoid pursuant to Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13 (a): The complaint charged unlawful price discrimination by Ruberoid in its interstate sales of roofing and allied products, and that the effect of the price discrimination had been, or might be, substantially to lessen competition among purchasers from Ruberoid (R. 1-4). Ruberoid's answer admitted that many of its customers were in competition with each other, and that it granted wholesalers a greater discount than that granted retailers and "applicators"<sup>1</sup> (R. 6). It denied, however, that it discriminated and that its practices were or might be injurious to competition. It pleaded affirmatively that its price differentials were justified by cost factors, or were made in good faith to meet competition (R. 6-7).

Evidentiary hearings were held before a trial examiner in New Orleans, Louisiana, in March, 1946 (R. 7-56, 79-80, 82, 84).<sup>2</sup> The Commission called as witnesses the sales manager of Ruber-

<sup>1</sup> "Applicators" refers to roofing contractors who applied Ruberoid products on contract jobs for which they were paid as a whole. (R. 5, 96).

<sup>2</sup> No evidence was taken after these hearings were concluded, but the record was not closed until June 7, 1948, at a formal hearing held in Washington, D. C. (R. 57, 79-80).

oid's southern division and a number of persons engaged in the roofing business in the New Orleans area, and introduced into evidence a number of documentary exhibits. Ruberoid did not call any witnesses or offer any proof. It admitted the giving of the discounts (R. 6, 9, 12), but denied that it had ever "discriminated" in price between its customers (R. 6). Although Ruberoid's answer sought to justify the practices by reference to "competitive conditions in the industry", it offered no proof in support of this claim. Nor did Ruberoid present any evidence that the discount practices had been discontinued; on the contrary, the testimony of its southern sales manager clearly suggested that such practices were continuing (R. 12, 20-21).

The trial examiner filed a recommended decision (R. 56-77) in which he concluded that Ruberoid had violated Section 2 (a) of the Act. Exceptions thereto were filed (R. 77-84), briefs were submitted, and the Commission heard oral argument (R. 86).<sup>2</sup>

On January 20, 1950, the Commission issued its findings of fact and conclusion (R. 86-90). It found that Ruberoid had discriminated in price by selling its product to some of its customers at prices lower than those at which it sold products of like grade to other customers who were competing with the favored customers (R. 87); that

such differentials were not justified by lower costs (R. 89) / and that the effect of such price discrimination may be substantially to lessen and to injure, destroy or prevent competition among Ruberoid's customers (R. 89). The Commission concluded that Ruberoid's price discriminations were violative of Section 2 (a) of the Clayton Act (R. 90). It accordingly issued an order directing Ruberoid to cease and desist from discriminating in price (R. 90-91).—

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products.

Ruberoid then filed in the court below a petition to set aside or to modify the order (R. 91-94). It did not seriously contest issuance of some form of order against it, but contended that the order was too broad and that it should accordingly be set aside or, alternatively, modified to include certain exemptions and provisos (R. 92-94, 96-97)<sup>3</sup>. Overruling these contentions, the court unanimously held that the order was within the Commission's authority and that the order "must therefore stand, for appropriate enforcement" (R. 97-99). The final line of the court's

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<sup>3</sup> These contentions are the subject of Ruberoid's cross-petition in No. 504, this Term, briefed separately by the Government.



opinion reads: "Order affirmed; enforcement granted" (R. 99).<sup>\*</sup>

Ruberoid filed a petition for rehearing directed solely to the question of enforcement (R. 100). It contended that the Commission was not entitled to enforcement "as a matter of right or of course" upon affirmance of the order; that enforcement should be granted only upon a showing of actual or threatened violation of the order; and that a party affected by a cease and desist order may challenge its validity or scope "without subjecting itself to a court injunction" (R. 100-101).

The court granted the petition for rehearing (R. 123), holding that the portion of its decision directing enforcement was "premature" and should be stricken (R. 119, 122-123). The court stated that if the Commission had petitioned for enforcement, it would have been required to show that a violation of the order "has occurred or is imminent," and that there is no convincing reason why the Commission should not be "required to make the same showing" of a threatened violation when the proceeding is brought by a private party to set aside the order (R. 119). The court also stated that there was "uncontra-

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<sup>\*</sup>The Commission did not file a formal cross petition for enforcement. However, in the closing paragraph of its brief it requested that the court affirm and enforce the order (R. 110-111, 119).

dicted evidence" that the practice against which the Commission's order was directed "has been abandoned" (*ibid.*).

Judge Clark, dissenting, stated that the cases "have consistently ruled" that where a respondent petitions for review, the matter is "ripe for full decision," and that "two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished" (R. 120); that the cases in support of this proposition "are too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate" (*ibid.*); and that the court's modification of its order would "tie up commission practice with merely repetitious hearings" (R. 121), thus tending to "fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one" (R. 119). Judge Clark also concluded that the majority was "seriously in error" in suggesting that there was uncontradicted evidence of abandonment of the practice in question (R. 121).

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

- (1) In failing to grant enforcement of the order which it duly affirmed.
- (2) In holding that the Commission was not entitled to enforcement of the order in the absence of a showing of noncompliance.

(3) In concluding that there was uncontradicted evidence of abandonment of the illegal practices prohibited by the order.

#### SUMMARY OF ARGUMENT

The general legislative pattern relating to administrative cease and desist orders usually provides either penalties for their violation, or proceedings by the agency to enforce them. Orders issued by the Federal Trade Commission under Section 11 of the Clayton Act are subject to the latter provision. This Court has indicated that it does not construe the statute to require proof of violation as a prerequisite to enforcement. *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, rehearing denied 302 U. S. 779. This construction is supported by the statutory language, and is in accord with the rule that equity may go "much farther" to give relief "in furtherance of the public interest" than "when only private interests are involved." *Virginian Railway Co. v. System Federal No. 40*, 300 U. S. 515, 552.

It is unnecessary, however, for the Court to decide in this case whether, on a Commission petition for enforcement, a showing of disobedience of the Commission order is required. Whatever the merits of requiring proof of violation prior to enforcement when the Commission is the moving party, there is no basis for imposing this requirement where the issue of enforcement

arises on a petition to review filed by the affected party.

## I

A. Cease and desist orders of the Federal Trade Commission under the Clayton Act can come before a court of appeals either on an affected party's petition to review, or on a Commission application for enforcement. Upon a petition to review, the court of appeals has both the *power* and the *duty* to enforce the order if it affirms it. Actual or threatened violation of the order need not be shown as a prerequisite to enforcement.

A showing of noncompliance when the Commission seeks enforcement may be required to avoid unduly burdening the courts. Where, however, the matter already is before the court on a petition to review, enforcement would impose no additional burden on the court. To require a showing of violation in such circumstances would handicap effective enforcement of the Act. The almost unvarying judicial practice, both in this Court and in the courts of appeals, has been to enforce upon affirmance. E. g., *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730; *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760.

B. A mere showing of abandonment of the illegal practices is no bar to enforcement. The Commission is not precluded from issuing a cease



and desist order under Section 5 of the Federal Trade Commission Act merely because the practices have been discontinued. *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260. Nor does an employer's compliance with an order of the National Labor Relations Board bar the Board from obtaining enforcement of the order. *National Labor Relations Board v. Mexia Textile Mills*, 339 U. S. 563. These cases, which are in all respects analogous to this, indicate that a violator cannot block enforcement of a valid Commission order merely by showing abandonment, and thus remain free to resume the illegal practices as soon as the judicial proceedings have been concluded.

## II

If enforcement is a matter for the court's discretion, the court abused such discretion by denying enforcement in this case. Even if enforcement of a valid order is not required in all cases by statute, the court should exercise its discretion by following the customary judicial practice of granting enforcement on petitions to review unless a violator can show special circumstances calling for an exception. Mere abandonment is not enough to justify nonenforcement; the burden is on the party resisting enforcement to show that "there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum*

*Co. of America*, 148 F. 2d 416, 448 (C. A. 2) (L. Hand, C. J.).

Thus the court of appeals' conclusion that there was "uncontradicted evidence" of abandonment, even if correct, would not justify refusal of enforcement. Moreover, it is clear that the record does not support this conclusion of abandonment.

#### ARGUMENT

#### INTRODUCTION

Ruberoid concedes (Brief in Opposition to Petition, p. 3), as, indeed, it must, in the light of decisions of this Court,<sup>5</sup> that in a proceeding brought by the affected party to set aside a Commission cease and desist order, the courts have power, if they sustain the order's validity, to enforce it. It argues, however, that enforcement ought not be granted unless the Commission shows that its order has been violated, or that violation is threatened. This view was adopted by the court below. It is based upon the assumptions (1) that under the statute enforcement cannot be obtained in a proceeding brought by the Commission unless there has been such a showing, and (2) that the same principle should be applied where enforcement is sought in a proceeding

<sup>5</sup> See, e. g., *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730, and *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760, discussed *infra*, pp. 28-29. Decisions of the courts of appeals to the same effect are collected, *infra*, n. 12.

brought by an affected party to set aside the order. Neither of these assumptions is correct.

Legislation providing for the issuance of administrative prohibitory orders generally also provides sanctions for violation of such orders. For example, there are statutory penalties for violation of cease and desist orders issued by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U. S. C. 45 (1). Where no such penalty is provided, the agency ordinarily may procure judicial enforcement upon a showing that the order is valid, *e. g.*, Section 10 (e) National Labor Relations Act, 49 Stat. 454, 29 U. S. C. 160 (e).

No penalty is provided for violation of cease and desist orders issued by the Federal Trade Commission under the Clayton Act. The Commission is given the usual right to seek judicial enforcement. However, the courts of appeals in four circuits have held that the Commission is required, if it institutes the proceedings, to show that the order has been violated before it can obtain enforcement.<sup>6</sup>

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<sup>6</sup> *Federal Trade Commission v. Herzog*, 150 F. 2d 450 (C. A. 2); *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474 (C. A. 4); *Federal Trade Commission v. Standard Education Soc.*, 14 F. 2d 947 (C. A. 7); *Federal Trade Commission v. Whitney & Co.*, 192 F. 2d 746 (C. A. 9). These were enforcement proceedings brought under Section 11 of the Clayton Act or under Section 5 of the Federal Trade Commission Act prior to its amendment in 1938 by the Wheeler-Lea Act. Judge Clark suggested, in his dissenting opinion (R. 120), that these cases deserve

Although this Court has never discussed the question in any opinion, its decision in *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, rehearing denied, 302 U. S. 779, indicates that the Court does not construe the statute to require proof of violation as a prerequisite to enforcement. There is nothing in "reexamination" in the light of the numerous cases, arising on petitions to review Commission orders, in which enforcement was granted without regard to violation. See *infra*, n. 12.

See also H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5, discussing the bill which became the Wagner Act: "It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, *without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future.*" [Italics supplied.]

That was an action by the Commission to enforce a cease and desist order issued under Section 5 of the Federal Trade Commission Act prior to its amendment in 1938. The court of appeals reversed the order as to certain respondents, modified it in other particulars, and affirmed the remaining portions. The court then remitted the cause to the Commission as special master "to hear and report whether the respondents have complied with the provisions which are affirmed." 86 F. 2d 692, 698 (C. A. 2). This Court held that the court of appeals had erred in reversing or modifying all but one of the clauses in the Commission's order. It specifically held that clauses one and three of the order "should be sustained



practices does not bar enforcement of a cease and desist order prohibiting them.

The Commission itself is not precluded from issuing a cease and desist order under Section 5 of the Federal Trade Commission Act merely because the practices have been discontinued. Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U. S. 257, 260; Consolidated Royal Chemical Corp. v. Federal Trade Commission, 191 F. 2d 896 (C. A. 7); *Galler v. Federal Trade Commission*, 186 F. 2d 810, 813 (C. A. 7); certiorari denied, 342 U. S. 818; but cf. *Oregon-Washington Plywood Company v. Federal Trade Commission*, C. A. 9, No. 12,774, *et al.*, January 24, 1952. Nor will abandonment justify refusal to enforce such an order on petition by the Commission; *Federal Trade Commission v. Wallace*, 75 F. 2d 733 (C. A. 8). Similarly, discontinuance has been held immaterial in proceedings to review orders issued under Section 5 of the amended Federal Trade Commission Act. *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F. 2d 968 (C. A. 3); cf. *Bunte Bros. v. Federal Trade Commission*, 104 F. 2d 996 (C. A. 7).<sup>11</sup>

<sup>11</sup> *In Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211 (C. A. 7), affirmed, 324 U. S. 726, the Commission had issued a cease and desist order directed to violations of Sections 2 and 3 of the Clayton Act. Respondents filed a petition to set aside the order in which they contended, *inter alia*, that they had complied with certain conditions in the order. The court held that this claim had not been proved, but went on to state that "Furthermore, the

The fact that enforcement has been directed practically without discussion of the issue in cases, both how well settled the practice is and how little opposition to it there has been. And, since the decision below, another court of appeals has flatly held that the Commission is entitled to enforcement upon affirmation notwithstanding the absence of a showing that violation of the order has occurred or is imminent." *Automatic Canteen Company of America v. Federal Trade Commission*, 7th Circuit, No. 10239, January 18, 1952.<sup>16</sup> The court there stated that it was in accord with Judge Clark's dissenting opinion in the instant case that the court "does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission."

*B. A mere showing of abandonment of the illegal practices is no bar to enforcement*

The court of appeals concluded that there was "uncontradicted evidence" that the practice of giving discriminatory discounts had been abandoned. We submit, however, that the issue of abandonment is irrelevant to the question of enforcement. Clearly, mere abandonment of illegal enforcement, a cross petition to enforce filed in response to a petition to set aside cannot be likened to an original enforcement application.

<sup>16</sup> Copies of the opinion were attached to the Commission's supplemental memorandum in support of its petition for certiorari, filed with the Court on January 23, 1952.

Act and the Federal Trade Commission Act. It concluded a lengthy opinion with the following directive (333 U. S. 730) :

The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order. [Italics supplied.]

Similarly, in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, this Court decides decision that had set aside a Commission order under Section 2 (a) of the Clayton Act. There the Commission had cross-petitioned for enforcement. The Court stated (324 U. S. 760) :  
The Commission's order will be sustained. The judgment below will be reversed, and the cause remanded with instructions to enforce the Commission's order. [Italics supplied.]

These two cases indicate that in this Court's view enforcement is required upon affirmation. The Court did not remand for entry of an appropriate order—the normal practice if the scope of relief were a matter for the discretion of the court below—but specifically directed enforcement. The presence or absence of a cross-petition was not deemed significant.<sup>15</sup>

<sup>15</sup> Since in our view the court has a duty to enforce whenever it affirms, the existence of a cross-petition is irrelevant.

In *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, this Court considered the validity of a Commission cease and desist order issued under Section 2 (a) of the Clayton Act and Section 5 of the Federal Trade Commission Act.<sup>13</sup> The court of appeals had set aside the order on respondents' petition; the Commission had not filed any cross-petition. This Court held that respondents had violated both the Clayton

compatible with the view that the court's jurisdiction is original. Certainly the form of order entered is not determinative of whether the jurisdiction is original. Moreover, the cases erroneously assume that the same factors that control the granting of injunctive relief in a suit between private parties are similarly determinative of the government's right to enforcement of a valid Commission order. See *supra*, pp. 18-19.

<sup>13</sup> Prior to 1938, the enforcement and review provisions of the Federal Trade Commission Act were virtually identical with those of the Clayton Act. In that year, however, the statutory scheme for enforcement of Commission orders under the former statute was drastically changed. Petitions to review were required to be filed within 60 days; Commission orders became final if no appeal was taken within that period; penalties were provided for violation of such final orders; enforcement actions by the Commission were eliminated; and the court, on a petition to review, was required to enforce the order to the extent it was affirmed. 52 Stat. 111, 15 U. S. C. 45.

The fact that the Clayton Act was not similarly amended at the same time specifically to require enforcement upon affirmation does not support Ruberoid's position. The changes in the enforcement procedures were only one part of the extensive amendments made in the statute. Congress did not then have before it any proposals for similar changes in the enforcement provisions of the Clayton Act. See the decision below, *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C. A. 7).



in his dissenting opinion, "The cases in support of this proposition are ~~too many~~ and too important to be dismissed on the ground that we think their discussion of the issue perforce inadequate" (R. 120).

(C. A. 5), certiorari denied, 310 U. S. 638; *Modern Marketing Service v. Federal Trade Commission*, 149 F. 2d 970, 980 (C. A. 7); *The Q. R. S. Music Company v. Federal Trade Commission*, 12 F. 2d 730, 733 (C. A. 7).

No cross-petition filed: *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 730; *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C. A. 1); *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378, 380 (C. A. 2); *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 678 (C. A. 3); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (C. A. 6); *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 221 (C. A. 7), affirmed, 324 U. S. 726; *Carter Carburator Corporation v. Federal Trade Commission*, 112 F. 2d 722, 737 (C. A. 8).

There are contrary dicta in *Butterick Co. v. Federal Trade Commission*, 4 F. 2d 919, 913 (C. A. 2), certiorari denied, 267 U. S. 603, and *Federal Trade Commission v. Fairfoot Products Co.*, 94 F. 2d 844, 846 (C. A. 7), in both of which the court granted enforcement, and a contrary decision in *L. B. Stever Co. v. Federal Trade Commission*, 292 Fed. 752 (C. A. 6), decided almost thirty years ago. In these cases, however, the courts assumed that they were exercising original rather than appellate jurisdiction in reviewing Commission orders. They accordingly applied the general equity rule requiring a showing of threatened injury as a condition to enforcement. We submit, however, that the jurisdiction involved is clearly not original. It is rather a "special statutory jurisdiction." Cf. *Federal Trade Commission v. Bulme*, 23 F. 2d 615, 618 (C. A. 2), certiorari denied, 277 U. S. 598. The provision in Section 11 of the Clayton Act, that the Commission's findings if supported by substantial evidence are conclusive upon the court, is hardly

deemed to have intended so cumbersome an enforcement technique as that produced by the decision below.

Moreover, failure to grant enforcement would lead to the issuance of merely advisory opinions by appellate courts. The court's jurisdiction would be invoked to determine the validity of the order, but no sanction would attach to flouting the judicial determination. The strong policy against judicial decision of abstract questions emphasizes the need for the court to decree enforcement whenever it affirms.

The almost unvarying judicial practice has been to order enforcement upon affirmation, whether or not the Commission has cross-petitioned for enforcement.<sup>12</sup> As Judge Clark stated in Act, and the two statutes were enacted and approved within a few weeks of one another.

Further evidence that Congress intended to make Commission procedures prompt and effective is found in the fact that both Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act (*supra*, p. 4), provided that "proceedings in the United States Court of Appeals shall be given precedence over cases pending therein, and shall be in every way expedited."

<sup>12</sup> Cross-petition filed: *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760; *Judson L. Thompson Mfg. Co. v. Federal Trade Commission*, 150 F. 2d 952 (C. A. 1); *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (C. A. 2); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607 (C. A. 4); *Sigynode Steel Strapping Co. v. Federal Trade Commission*, 132 F. 2d 48, 54 (C. A. 4); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 771 (C. A. 4); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268

has conceded the court's jurisdiction, *i. e.* power, to grant enforcement on a petition to review (Br. in Opp. 8, 10, 14). As used in this context, "jurisdiction" refers only to the nature of the order that the court may issue, and not to any prerequisites to the exercise of the court's power. Applying to review proceedings the limitation deemed applicable by some courts to enforcement proceedings brought under Section 11 furthers no public policy. On the contrary, applying this limitation would handicap effective enforcement of the Clayton Act. Proceedings conducted by the Commission under that Act often are of long duration, involve extensive administrative hearings, and protracted review proceedings.<sup>10</sup> Interposition of further administrative and judicial proceedings before a violator could be punished for disobedience would further increase the difficulty in securing compliance with the law and ease the path of the transgressor. Congress, which designated enforcement procedures to assure "the speediest settlement of disputed questions,"<sup>11</sup> is not to be<sup>10</sup> In *Federal Trade Commission v. Cement Institute*, 338 U. S. 683, the record of the administrative hearing comprised almost 100,000 pages, and was decided by this Court more than ten years after the proceeding was instituted.<sup>11</sup> The quoted language appears in the Conference Report on the Federal Trade Commission Act, H. Rep. No. 1142, 63rd Cong., 2nd Sess., p. 19. The enforcement provisions of Section 5 of the original Federal Trade Commission Act (38 Stat. 719) are virtually identical with those of the Clayton

secure the full benefits of the adjudication and to terminate the litigation in a single suit." *Texas v. Florida*, 306 U. S. 398, 412. This would reduce the burden on the judiciary by eliminating separate enforcement proceedings if respondent failed to comply with the order. In construing Section 11 of the Clayton Act, the courts and the Commission are not to be regarded as "wholly independent and unrelated instrumentalities of justice," but as complementary agencies seeking to achieve "the plainly indicated objects of the statute \* \* \* through coordinated action." *United States v. Morgan*, 307 U. S. 183, 194.

Moreover, no legally protectible interest of respondent is adversely affected by granting enforcement. Certainly respondent cannot be heard to complain of the loss of its right to disobey a judicially approved order. Cf. *National Labor Relations Board v. General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2). The provision in Section 11 of the Clayton Act, that the court shall have the "same jurisdiction" to affirm, set aside or modify on a petition to review as on an application to enforce, makes it manifest that the court is empowered to grant the same relief no matter who initiates the proceedings. Thus the court is not limited to granting or denying the petition to set aside the order, but may also affirm, modify or enforce it. *Rubero*



the same showing of a threatened violation of its order as it must had it petitioned for enforcement" (R. 119). We submit that the court, in so ruling, failed to give effect to significant differences between the two types of judicial proceedings.

There is a sound practical reason why noncompliance with the order might be required in a direct enforcement proceeding, but not in a proceeding brought by a party against whom a Commission order runs. It was reasonable and appropriate for Congress to assume that where the parties affected sought no judicial review, the Commission's order would ordinarily be obeyed. Where there was, in fact, compliance, applications for enforcement would impose upon the courts a burden out of proportion to the advantage to the Commission in having the sanction of a court decree. In those cases in which the order was not obeyed, the Commission was authorized, by the statute, to apply for enforcement. Where, however, the scope or validity of the order is already before the court on a petition to review, entry of a decree enforcing those orders or parts of orders found to be valid imposes no additional burden upon the reviewing tribunal. Once the court has the controversy before it for final disposition, it should enforce the order "to a cross-petition. Cf. *Electric Thermal Co. v. Federal Trade Commission*, 91 F. 2d 477 (C. A. 9).

clear, then, and Ruberoid does not dispute (Br. in Opp., p. 3), that the juxtaposed words "affirm", "set aside" and "modify", when read in the context of the other language in the Section, clearly import the power to enforce. When an affected party files a petition to review, the court's power is not limited to affirming the order, but clearly authorizes enforcement. "Unless otherwise provided by statute, all the inherent equitable powers" of the court are available "for the proper and complete exercise" of the court's jurisdiction to "enforce compliance with the Act." *Porter v. Warner Holding Co.*, 328 U. S. 395, 398.

The court below was nevertheless of the opinion that in a proceeding instituted by a party against whom the Commission has issued a Clayton Act cease and desist order, the Commission, if it requests enforcement, is "required to make

\* Some cases have treated affirmance as equivalent to enforcement, and have held respondents in contempt for violation of an order that was merely affirmed. *Pacific States Paper Trade Ass'n v. Federal Trade Commission*, 4 F. 2d 457 (C. A. 9), respondents adjudged in contempt, 88 F. 2d 1009; *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687 (C. A. 2), certiorari denied, 305 U. S. 634, respondent held in contempt, unreported order of June 5, 1941, No. 15694; *Leavitt v. Federal Trade Commission* (unreported), C. A. 2, No. 9037, orders of February 4, 1929, and December 24, 1935; but see *Federal Trade Commission v. Fairfoot Products Co.*, 94 F. 2d 844 (C. A. 7).  
 \* The court treated the Commission's request for enforcement contained in the last paragraph of its brief as equivalent

orders begins with the words: "If such person [the party directed to cease and desist] fails or neglects to obey such order of the Commission or Board while the same is in effect," the Commission may apply to the appropriate court of appeals "for the enforcement of its order." The paragraph, after providing for the filing of the administrative record and the giving of notice to the affected party, provides that the court "shall have power" to enter a decree "affirming, modifying, or setting aside" the Commission's order.

The paragraph relating to petitions to review by an affected party, however, makes no reference to violation of the order. It merely provides that "any [affected] party \* \* \* may obtain a review" of the order by filing a petition to set it aside with the court of appeals. In such a proceeding, the court shall have "the same jurisdiction to affirm, set aside, or modify" the order "as in the case of an application by the Commission or Board for the enforcement of its order." [Italics supplied.]

These provisions are followed by a paragraph which states:

The jurisdiction of the United States court of appeals to *enforce*, set aside, or modify orders of the Commission or Board shall be exclusive. [Italics supplied.]

The three paragraphs thus use the words "affirm" and "enforce" interchangeably. It is

await him upon detection than if all he has to fear is an enforcement action. The public interest requires something more than mere empty affirm-  
ance of Commission orders.

Such an unusual departure from sound judicial practice as would be entailed if proof of violation were required for enforcement on petitions to review should only be made on the clear showing that Congress specifically intended this anomalous result. As we demonstrate in Point IA, *infra*, Congress did not so provide in Section 11 of the Clayton Act.

## I

THE COURT OF APPEALS WAS REQUIRED, UPON AFFIRM-  
ING THE COMMISSION'S CEASE AND DESIST ORDER,  
TO ENFORCE IT

A. Section 11 of the Clayton Act does not require  
a showing of violation of the order as a condi-  
tion to enforcement.

Cease and desist orders issued by the Federal Trade Commission under the Clayton Act can come before a court of appeals in two ways: (1) Upon an application by the Commission for enforcement; or (2) on a petition by the affected party to set aside the order. However, the statutory prerequisites to judicial consideration are not alike in the two situations.

The paragraph in Section 11 dealing with actions brought by the Commission to enforce its



both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Railway Co. v. System Federal No. 40*, 300 U. S. 515, 552; see *Porter v. Warner Holding Company*, 328 U. S. 395, 398. The public interest to be protected in this situation is the effective prohibition of practices found illegal and ordered terminated by the Commission. The Commission, with its limited staff and extensive responsibilities, obviously cannot police our entire economy adequately to track down all violations of the laws it administers. A court should not withhold the aid of an enforcement order because of policy considerations in private litigation which are inapplicable to cases where protection of the public interest is the touchstone of procedural action. We think it unnecessary, however, for the Court to reach the question whether, on a Commission application for enforcement, it is a prerequisite that disobedience of the Commission order be shown. Whatever the merits of requiring proof of violation prior to enforcement when the Commission is the moving party, there is no basis for imposing this requirement in cases where the issue of enforcement arises on a petition to review filed by the affected party. To do so would leave a party who had unsuccessfully challenged a Commission order on the merits free to continue to flout the judicially approved order. Certainly a violator will be less likely to repeat his misdeeds if he knows that contempt proceedings

effective administration of the Act would be seriously burdened. Formal determination of violation is not a simple matter. It may require administrative proceedings almost as protracted as those necessary for issuance of the original order. And if Ruberoid is correct in contending (Br. in Opp., p. 13) that a Commission application for enforcement is "an original proceeding in the court of appeals sitting as a court of equity" (cf. In. 12, *infra*, pp. 27-28), the Commission might have to conduct a continuous inquiry, up to the very day of the judicial decree, for it would be as of that moment that the equity court would have to determine whether there is need for an injunction.

Clearly, the mere bringing of an enforcement action is itself an attestation by the Commission that it has determined that the affected party has failed or neglected to obey the order. The courts cannot assume, as the rule requiring proof of violation implies, that the Commission will callously ignore the specific directive of Congress that it should seek enforcement only where there has been a violation of the order.

Furthermore, whatever the rule may be as to requiring proof of threatened injury in the usual injunction suit between private parties, see *Connelly v. Massachusetts*, 282 U. S. 660, 673, a different rule should prevail where the Commission's aim is not vindication of a private right but protection of the public interest. "Courts of equity may, and frequently do, go much farther.

the issue of compliance, (4) the Commission decide the issue upon the basis of such record, or (5) the transcript of the proceedings be filed with the court. Nor is there authority for the court to remand to the Commission for taking additional evidence on the fact of non-compliance. Congress evidently contemplated that the judgment of the Commission as to whether an affected party had failed or neglected to comply with the order would be exercised solely on the basis of administrative investigation.

Under such circumstances, the court has no basis upon which it can adequately review Commission findings as to non-compliance. Such findings stand upon a different footing from cease and desist orders. The latter, required to be made after compliance with specified procedures, are the only orders that Congress has authorized the courts to review. Determinations as to non-compliance are not only independent of, but perforce must be made subsequent to, issuance of cease and desist orders. Congress, which explicitly dealt with an affected party's right to seek review of cease and desist orders, made no provision for similar review of non-compliance determinations by the Commission.

If the Commission were required to show non-compliance every time it sought enforcement,

<sup>12</sup> The Commission may, and does, on occasion, hold a hearing on the question of compliance (*Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (C. A. 2)), but it is under no statutory obligation to do so.

the language of Section 11 of the Clayton Act to justify this judicially imposed limitation on the Commission's right to obtain enforcement. The statutory provision that the Commission may seek enforcement "if such [affected] person fails or neglects to obey such order," is, to be sure, a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement. But it cannot properly be read as imposing a condition which a court must find to be satisfied before it can grant enforcement.

Although the statute requires the Commission to determine whether there has been non-compliance with the order before court enforcement is sought, it provides no procedure for making such determination. In contrast to the detailed procedure specified on petitions to review or to enforce the cease and desist order, the statute is silent on procedure where non-compliance is the issue. There is no requirement that (1) notice be given to the affected party, (2) a hearing be held, (3) an administrative record be made upon and enforced" (302 U. S. 117), and that clause seven "should be enforced" (Id., p. 118).

Respondent filed a petition for rehearing, alleging, *inter alia*, that the Court's action in directing enforcement of the order without proof of violation was improper (pp. 3-7). The Court denied the petition. 302 U. S. 779. On remand from the Supreme Court, the court of appeals enforced the order without further proof of violation (97 F. 2d 513 (C. A. 2)).



A party against whom an injunction is sought is not entitled to dismissal of the proceedings "as a matter of right" because it has discontinued the condemned conduct. See *National Labor Relations Board v. General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2); cf. *Hecht Co. v. Bowles*, 321 U. S. 321, 327. As the court pointed out in the *General Motors* case:

After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches to a finding against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily that will not be a counterweight to the *protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind.* [Italics supplied.]

Under the judicial review provisions of the National Labor Relations Act, Section 10 (e), 29 U. S. C. 160 (e), embodying the same general mere discontinuance, were it proved, would not justify us in refusing to enforce the order" (144 F. 2d 220). The court modified the order in one respect, but "affirmed and enforced" it in all others (*Id.* at 221).

scheme as Section 11 of the Clayton Act,<sup>18</sup> the court is required to enforce a valid order of the Board on the Board's petition regardless of the other party's compliance with the order. *National Labor Relations Board v. Mexia Textile Mills*, 339 U. S. 563. This Court there stated (p. 567):

We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. \* \* \* A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree.

Moreover, "since the public interest is involved in a proceeding of this nature," the equitable powers of the court "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co.*, 328 U. S. 395, 398. The court is not

<sup>18</sup> The National Labor Relations Board is authorized to issue cease and desist orders respecting unfair labor practices. No sanction attaches to violations of such orders until enforced by the court. The Board may apply for enforcement of the order, and any affected party may petition to review it. In either case the court of appeals has power to enter a decree "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." If the court denies the petition to review, it can at the same time enforce the order. See *Ford Motor Co. v. National Relations Board*, 305 U. S. 364, 371.

bound by traditional equity doctrines that may limit the exercise of its powers when only private rights are at issue. A respondent cannot block enforcement of a valid Commission order by showing abandonment, and thus remain free to resume the illegal practices as soon as the judicial proceedings have been concluded.

## II

IF ENFORCEMENT OF THE COMMISSION'S ORDER UPON AFFIRMANCE IS DISCRETIONARY, THE COURT OF APPEALS ABUSED ITS DISCRETION BY DENYING ENFORCEMENT IN THIS CASE

In Point I, we have argued that under the statute the Court of Appeals has a duty to enforce the Commission's order upon affirmance. However, if this Court should disagree with us and conclude that enforcement is discretionary, we submit that the Court of Appeals abused its discretion by denying enforcement in this case.

The customary practice, grounded upon sound considerations of public policy, has been for the courts to enforce upon affirmance (*supra*, p. 26). Even if the statute leaves with the court a discretion to determine whether to enforce, we submit that the court should be required to exercise such discretion in favor of enforcement unless the violator can show special circumstances that call for an exception in the particular case. Enforcement should be the rule; refusal to enforce the exception. Mere abandonment of the illegal practices, with the violator left free to resume

them upon conclusion of the court proceedings, is not enough to justify departure from the usual rule of enforcement. "The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption \* \* \*. To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America*, 148 F. 2d 416, 448 (C. A. 2) (L. Hand, C. J.).

Thus the Court of Appeals' conclusion that there was "uncontradicted evidence" of abandonment<sup>19</sup> would not, even if correct, justify its refusal to enforce. Moreover, it is clear that this acceptance of a contention never presented to the Commission is not supported by the record.

Ruberoid's claim of abandonment was first made in its petition for rehearing filed with the court below in June 1951. There Ruberoid asserted that "it appears from the record" that the discriminations had "ceased" by the time of the Commission hearing in 1946 (R. 105). Not only did Ruberoid present no evidence at such hearing in support of this contention,<sup>20</sup> but the

<sup>19</sup> Judge Clark, in his dissenting opinion, stated that he believed that the majority was "seriously in error" in concluding that there was uncontradicted evidence that the illegal practice had been abandoned (R. 121).

<sup>20</sup> In its answer Ruberoid admitted the giving of discriminatory discounts to certain of its customers, allegedly because of "competitive conditions in the industry" (R. 6). Documentary and testimonial evidence introduced by the



testimony of its southern sales manager clearly suggested that the illegal discriminatory pricing practices were continuing. Although he twice denied that any discounts larger than the published ones were then being given (R. 15, 20), he indicated at other points in his testimony that "competitive conditions" in some areas might result in variations from the published discount schedules (R. 12, 20-21). Clearly something more substantial than such equivocal statements and vague hints are required to support a conclusion of "uncontradicted evidence" of abandonment.

In the court of appeals, Ruberoid did not sustain its burden of showing adequate justification for departure from the customary practice of enforcement. If the matter is one for the court's discretion at all, an appellate court should not be permitted, "in the exercise of the sound discretion, which guides the determination of courts of equity," *Beal v. Missouri Pacific Railroad Corp.*, 312 U. S. 45, 50, to handicap Commission enforcement of the law by denying enforcement of cease and desist orders on the tenuous showing made by Ruberoid in this case.

Commission conclusively established the giving of such discounts in 1941. Ruberoid presented no evidence in support of its assertion that "competitive conditions" had occasioned such discounts.

## CONCLUSION

For the foregoing reasons, the decree of the court of appeals should be modified to reinstate the provision for enforcement of the Commission's order.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

DANIEL M. FRIEDMAN,

RALPH S. SPRITZER,

*Special Assistants to the  
Attorney General.*

W. T. KELLEY,  
*General Counsel,*

JAMES W. CASSEDY,  
*Assistant General Counsel,  
Federal Trade Commission.*

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IN THE

# Supreme Court of the United States

October Term, 1951

No. 448

FEDERAL TRADE COMMISSION,

*Petitioner,*

*against*

THE RUBEROID CO.,

*Respondent.*

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**BRIEF OF THE RUBEROID CO. IN OPPOSITION  
TO ISSUANCE OF A WRIT OF CERTIORARI ON  
PETITION OF THE SOLICITOR GENERAL.**

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AUSTIN & MALKAN, 

*Attorneys for Respondent,*

500 Fifth Avenue,

New York 18, N. Y.

CYRUS AUSTIN,  
*Of Counsel.*

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IN THE  
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**BRIEF OF THE RUBEROID CO. IN OPPOSITION  
TO ISSUANCE OF A WRIT OF CERTIORARI ON  
PETITION OF THE SOLICITOR GENERAL.**

**Preliminary Statement.**

The Solicitor General, in behalf of the Federal Trade Commission, has petitioned this Court for issuance of a writ of certiorari to the Court of Appeals for the Second Circuit for review of a final decree of that court entered September 5, 1951 in a proceeding in which The Ruberoid Co. was petitioner and the Federal Trade Commission respondent. Said decree affirmed a cease and desist order of the Commission issued January 20, 1950 in a proceeding upon complaint pursuant to Section 11 of the Clayton Act (Title 15 U. S. C. sec. 21).

The Solicitor General does not complain of anything contained in the decree below. The decree is wholly favorable to the Government. It affirms the Commission's order

without modification. Review is asked only because the decree does not include a further provision enjoining respondent from violating the order.

The decree below does not deny an application for enforcement, for the simple reason that there was none. The Commission filed no answer or cross-petition to the petition for review of its order. At the end of its brief it made a bare, unsupported request that an injunction issue "pursuant to the statute", citing, with doubtful frankness, an inapplicable provision of the Federal Trade Commission Act. No violation or threat of violation of the order was charged, and no facts claimed to indicate need for an injunction were called to the court's attention.

On the initial hearing the question of enforcement was not argued, and the court upon affirming the order added the words "enforcement granted". Respondent thereupon petitioned the court for rehearing, pointing out that the Commission was not entitled to an injunction as a matter of right or of course, and asking the court in the exercise of its discretion to deny enforcement on the ground that the practices found unlawful by the Commission had long since been abandoned by respondent, that respondent had never asserted the validity of those practices or the right to renew them, and that there was no reason to apprehend renewal. The Commission opposed rehearing, but again was unable to point to any factual evidence of violation or threatened violation of its order within the limitations as to enforceability placed upon it by the court's opinion (R. 155). The court granted the petition for rehearing and struck the words "enforcement granted" from its decision. A decree was thereupon entered affirming the order, without injunctive provisions.

### Questions Presented.

The principal and only substantial question presented by the Solicitor General's petition is whether the Court of Appeals, upon review and affirmance of the Commission's order, was "bound" under the statute to issue a decree enjoining violation of the order, upon the Commission's bare request, in the absence of any showing of non-compliance or threatened non-compliance or other evidence indicating a need for injunctive relief.

There is no question of jurisdiction. Jurisdiction to enforce was conceded below, and was not denied by the court. The Solicitor General's contention is that the court, "having power to enforce, had the duty to enforce"; that the court has no discretion in the matter; that although sitting as a court of first instance it is not free to apply the principles followed by courts of equity in injunction suits generally.

No case under Section 11 of the Clayton Act is cited in support of this proposition. No court has ever held that this statute contains a mandate to the court of appeals to enjoin violation of a Commission order upon affirmance, in the absence of any evidence of non-compliance or threatened non-compliance. As we will show, there has been no conflict among the decisions in the several circuits. During the thirty-seven years that this Act has been on the books the decisions of the courts of appeals have been remarkably consistent in their interpretation of the review and enforcement provisions of Section 11. There has not even been a "changing trend" in the decisions, toward a "newer and more direct procedure", as is stated in the dissenting opinion below.

At the outset of his petition the Solicitor General attempts to raise a false issue. It is stated that "the court



below held it was incumbent upon the Commission to show affirmatively that the party attacking the order had failed to comply with it." This is untrue, although the same assertion is repeated throughout the petition.

Referring to proceedings arising upon application of the Commission for enforcement, the court pointed out that

"it is settled that the FTC cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred *or is imminent*." (Italics supplied.)

This much the Solicitor General concedes to be in accordance with prior judicial interpretation of Section 11 in all circuits. (In fact, the italicized words are somewhat in relaxation of the express statutory requirement making prior non-compliance with the order a condition precedent to an application for enforcement.) Passing over the doubtful sufficiency of the Commission's request for enforcement, the court continued:

"we find unconvincing the FTC's reasons why, upon a cross-petition, it is not required to make the same showing of a *threatened* violation of its order as it must had it petitioned for enforcement." (Italics supplied.)

It is thus apparent that the court denied enforcement, not only because there was no showing of past non-compliance with the order, but because it found in the facts before it no basis for an inference of *threatened* violation calling for the exercise of its equity jurisdiction. The court pointed out that

"the present petitioner did not deny that its original conduct violated the Act and there was uncontradicted evidence that the practice has been abandoned on which the FTC has not made a finding. *Under such circumstances* so much of our mandate as di-

rected enforcement of the order was premature and should be stricken." (*Italics supplied.*)

The importance of the distinction between a threat of future non-compliance with a cease and desist order, and actual prior non-compliance, as a basis for granting enforcement, is obvious. Courts of equity determine the necessity for enjoining an unlawful act or practice upon evidence indicating a threat or reasonable likelihood that the act or practice will thereafter be committed or engaged in. Prior non-compliance with a cease and desist order is only one among many facts from which a threat of future violation may be inferred. The need for an injunction may be inferred from the lack of any claim or showing of discontinuance of the forbidden practice, or from assertion by the respondent of the right to continue it, or from the mere failure of the respondent to oppose a request for enforcement. Here the court found no indication of any *threat* of non-compliance, and its decision was placed expressly on that ground.

Having attributed the decision below to "the absence of a showing of non-compliance", the Solicitor General proceeds to attack the straw man thus fabricated by citing a long list of cases for the proposition that the courts have "regularly" enforced orders held valid on petition for review "irrespective of compliance or non-compliance". These cases do not support the proposition for which they are cited. In none of them did the court hold that it had no discretion in the matter or that, in the absence of evidence of non-compliance, the statute makes an injunction mandatory. In many of them there was admission of non-compliance by failure to deny the allegations of the Commission's cross-petition, in some of them the practice forbidden was openly continued pending review, and in the others there was no claim of compliance and enforcement was not

opposed. The granting of injunctions under such circumstances falls far short of establishing that the courts treated this statute as making enforcement upon affirmance mandatory under any and all circumstances. So viewed, these cases are not at variance with the decision below.

The Solicitor General raises a subsidiary question by disputing the court's finding of evidence of record indicating abandonment of the practices found unlawful prior to the 1946 hearings. We doubt that this Court will be inclined to review this factual question. This case is of no public importance. It is concerned only with certain price discriminations in the sale of roofing materials found to have occurred in New Orleans in 1941. There is undisputed testimony that respondent's pricing policies in New Orleans were formulated to meet local competitive conditions and were not indicative of its pricing elsewhere; that in 1946 petitioner had; as to most products, adopted a one-price policy there; and that its remaining discounts there and elsewhere had been placed on a functional basis (R. 31-35). It is true that in 1946 respondent was granting true functional discounts on some products, in New Orleans and elsewhere, and still does so, but this case is not concerned with functional discounts. As the Commission stated in its brief below, "This order does not attack any functional differential granted or allowed to a purchaser in a particular functional class."

The Solicitor General's petition (p. 16) asserts that the testimony "indicates that at that time respondent had not abandoned its discount practices". The petition cites testimony as to carload discounts which were not challenged in this proceeding and which the court has said it would not regard as violations if justified by cost differences. The indication is that the Commission is still seeking enforcement of this order according to its terms in spite of

the clear indication by the court below that it has no intention of permitting such enforcement (R. 155). This matter has been fully covered in respondent's cross-petition for certiorari, and presents an additional reason why enforcement of the order should not be directed by this Court unless the order is first modified in the respects prayed below.

### **The Statute.**

Review and enforcement of cease and desist orders of the Commission in Clayton Act cases is governed by Section 11 of that Act, the pertinent provisions of which are as follows:

"If such person fails or neglects to obey such order of the commission \* \* \* while the same is in effect, the commission \* \* \* may apply to the circuit court of appeals of the United States \* \* \* for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, \* \* \*. Upon such filing of the application and transcript the court \* \* \* shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter \* \* \* a decree affirming, modifying, or setting aside the order \* \* \*.

"Any party required by such order of the commission \* \* \* to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order \* \* \* be set aside. \* \* \*. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order \* \* \* as in the case of an application by the commission \* \* \* for the enforcement of its order, \* \* \*.

"The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission \* \* \* shall be exclusive."



The above provisions have been on the statute books for thirty-seven years, and have frequently been applied by the courts. This fact in itself, plus the fact that this Court never before has been asked to hold that the Act makes enforcement upon affirmance is mandatory, should arouse skepticism as to the existence of conflict between the prior decisions in the various circuits.

The scheme of the Act seems clear. If the order is violated, whether or not its validity is challenged, the Commission may apply to the court for enforcement. On the other hand, a respondent who desires in good faith to comply with the Commission's directive, but questions its validity or scope, may petition for review on that issue alone. In either case the court obtains jurisdiction of the proceeding and is empowered to affirm, modify or set aside the order. Upon a petition for review however, the issue of enforcement does not arise unless the Commission applies therefor by cross-petition or otherwise; and in that case the court, having jurisdiction of the proceeding, may grant an injunction if the need therefor appears, applying the principles followed by courts of equity in injunction suits generally.

The question of affirmance or modification, and the question of enforcement, are therefore separate and distinct. The one depends upon the validity of the order, in whole or in part, when issued. The other depends upon non-compliance, or (in case of affirmance upon petition for review) evidence of other facts indicating a sufficient threat of non-compliance to justify the granting of an injunction. Indeed, the Commission has no need or occasion to seek an injunction so long as there is no threat of non-compliance, and that is equally true whether the respondent does or does not exercise its right to have a review of the order's validity.

It is urged, however, that different considerations should govern the granting of an injunction when the respondent petitions for review than when the Commission applies for enforcement. Whether or not that might be deemed good policy, to so construe this statute would lead to rather absurd results. A petition for review by a respondent is a purely fortuitous circumstance so far as the Commission is concerned. Certainly Congress, in making non-compliance an express condition of an application for enforcement, did not intend the hurdling of that requirement to depend upon a circumstance over which the Commission has no control. If the intention had been to make enforcement dependent only on affirmance, Congress would have eliminated the hurdle, as it did later in the National Labor Relations Act.

The filing of a petition for review creates no additional reason or necessity for making enforcement mandatory. The statute evidently was enacted upon the assumption that Federal Trade Commission orders would in the great majority of cases be respected and complied with; that a respondent should have an untrammelled right to judicial review; and that only when the respondent is violating or threatening to violate the order is the court to be called upon to enforce. Experience has proved the wisdom of this plan, and proceedings by the Commission against violators have been relatively few.

The true and only difference in the considerations affecting enforcement in the two types of proceeding is that where the case is heard upon the Commission's application for enforcement, the required proof that the respondent has failed or neglected to obey the order serves a dual purpose. Such proof serves to validate the application, and to that extent is jurisdictional. And, violation having been proved, and the court having acquired jurisdiction of the proceeding, the same proof provides ground for the issuance of an

injunction. On the other hand, where the case originates upon petition for review, jurisdiction does not depend upon a showing of non-compliance, although such showing still will provide sufficient ground (and the only statutory ground) for enforcement. And it has been held in such cases, when the question has arisen, that the court, having jurisdiction of the proceeding, and even in the absence of evidence of non-compliance, may in its discretion grant enforcement whenever the facts before it indicate that an injunction is necessary or proper.

The Solicitor General claims that to allow the court of appeals any discretion in the matter of enjoining violation of a Clayton Act order will result in delaying and impeding enforcement. Quite the contrary is true, as may be readily shown. In the first place, in most cases where a respondent has petitioned for review the court has found need for enforcement and has issued an injunction. In the few cases, including the present case, where an injunction has been denied, the denial has been on the ground that the forbidden practice was discontinued long before the issuance of the order and there were no other facts indicating a threat of renewal. In such cases there is no reason to assume that the court was wrong or that there will be any further necessity for enforcement.

However, assuming that the respondent is plotting violation (which seems to have been the basis of Judge Clark's dissent below), a petition for review does not delay and may facilitate enforcement. In the present case, for example, nearly a year elapsed between the filing of the petition for review and the presentation of the case to the court. During that interval the Commission had ample opportunity to ascertain whether respondent was complying with the order. If it had obtained evidence of non-compliance the court undoubtedly would have received it. Without such

evidence the Commission could not have applied for enforcement anyway. Also, the petition for review relieved the Commission of the jurisdictional necessity of establishing non-compliance and it was at liberty to apply for enforcement upon a showing of any facts indicating that non-compliance was threatened.

Furthermore, where the Commission applies initially for enforcement, the court must determine two questions (1) the validity of the order, and (2) whether there has been non-compliance. In the present case, if the Commission should hereafter apply for enforcement, non-compliance will be the only issue, the validity of the order having already been passed upon. If the Commission is concerned about speedy enforcement of its orders it should be glad to have the question of affirmance decided and out of the way before occasion for enforcement arises.

There is a further and still more important consideration. Section 11 of the Clayton Act places no limitation on the time for enforcement or review. When the Commission issues an order of doubtful validity or scope, the respondent has the choice of petitioning for review or adopting his own interpretation of the order until such time as the Commission applies for enforcement. Most respondents prefer to petition for review so as to obtain as promptly as possible an adjudication of what changes in their business practices are necessary for compliance. But if it should now be held that if the order is affirmed upon review an injunction will issue as a matter of course, the respondent would be better advised to ignore the order until the Commission can catch up with him and obtain evidence of violation. If the Commission applies for enforcement the respondent can then raise every question as to the validity of the order that could have been raised on petition for review, and he will in addition have the benefit of a judicial



decision as to whether the specific practice charged constitutes a violation, and without any penalty if the charge of violation is upheld. The short cut now proposed would simply divert traffic from one channel to the other. It would penalize a respondent who petitions for review, would place a premium on violation, and would add to the enforcement burden of both the Commission and the courts.

**Where An Order Is Affirmed On Petition for Review,  
and Non-compliance Is Not Shown, the Issuance  
of a Decree of Enforcement Is Discretionary.**

Section 11 of the Clayton Act provides that the Commission may apply to the court of appeals for the enforcement of its order "if such person fails or neglects to obey such order of the commission \* \* \* while the same is in effect". There is no exception to this requirement elsewhere in the section. The first step in enforcement is the issuance of an injunction. The statute plainly authorizes the Commission to apply to the court for an injunction when, and only when, the respondent has violated the order. Under those circumstances, and only under those circumstances, does the statute provide for the issuance of an injunction. The statute has uniformly been so construed.

Prior to amendment in 1938 the review and enforcement provisions of Section 5 of the Federal Trade Commission Act were identical with those of Section 11 of the Clayton Act. In a number of cases the Commission attempted, without success, to persuade the court of appeals to ignore the statutory requirement and grant enforcement after affirmance, in cases arising upon the Commission's application, without evidence of non-compliance. In *Federal Trade Comm. v. Standard Education Society*, 14 F. 2d 947, 948 (7th Cir., 1926), the court said:

"If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory. \* \* \*

"Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. It was the apparent intention of the Congress to give the practitioner of the alleged unfair methods an opportunity to mend its way before subjecting it to a decree of court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed."

See also, *Federal Trade Comm. v. Morrissey*, 47 F. 2d 101, 102 (7th Cir., 1931); *Federal Trade Comm. v. Herzog*, 150 F. 2d 450, 452 (2nd Cir., 1945).

A proceeding upon application by the Commission for enforcement is an original proceeding in the court of appeals sitting as a court of equity. It is in reality a suit for an injunction against violation of the Commission's order. Since the Commission is authorized to apply for enforcement where, and only where, there has been non-compliance, proof of non-compliance serves both to satisfy the jurisdictional requirement and to provide ground for the injunction. No lesser proof will suffice, and no more is necessary.

Where the Commission has not applied for enforcement, and a petition for review is filed by the respondent, the jurisdiction of the court to affirm, modify or set aside the

order partakes more of the nature of appellate jurisdiction. The question of enforcement is not presented unless the Commission asks for an injunction by cross-petition or otherwise; although it may well be that the court, having jurisdiction of the proceeding, may decree enforcement of its own motion if the need for enforcement appears. If the Commission requests enforcement, and non-compliance is shown or is not denied, the Commission is entitled to an injunction equally as if the proceeding had originated upon application for enforcement. But if there is no showing of non-compliance, and therefore no statutory basis for an application by the Commission, the jurisdiction to enforce must rest solely in the court's equity jurisdiction over the proceeding. It follows that in that case the issuance of an injunction is discretionary, to be granted or denied upon application of the principles followed by courts of equity in injunction suits generally.

The statute is devoid of any mandate to the court of appeals to grant enforcement upon affirmance in the absence of non-compliance. Neither this Court or any court of appeals has ever construed the statute as containing such a mandate. In the few cases where the question has arisen the courts have uniformly held that where the order is affirmed on petition for review, and there is no showing of non-compliance, the decision whether to grant or deny an injunction is one lying within the discretion of the court.

The leading case (which the Solicitor General attempts to toss off as "an early decision contrary to the usual practice") is *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923). A petition for review was there filed by the Silver Company. The court affirmed the order with modifications; and the Commission moved for recall of the

mandate and for entry of a decree of enforcement. The court stated:

"We directed a modification of the Commission's order in certain respects, and in other respects affirmed it. The Commission now asks that this mandate be recalled, and that this court enter its decree enjoining the Silver Company from further continuing those practices as to which we had affirmed the Commission's order. The ground of this application is that there must be an order of this court before there can be any enforcement of the Commission's order through punishment for violation; that if the application in this matter had been by the Commission for enforcement, instead of by the Silver Company for vacation, the court would have entered such an injunction order; and that, to avoid unnecessary forms and proceedings, such an order should likewise be entered when a petition for vacation is denied. \* \* \*

"It does not necessarily follow that the court should take the same action upon a petition for a respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for that purpose. \* \* \*

"We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.



"It is the general practice in such cases that, if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, \* \* \*. The situation, then, is that, as to the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

The review and enforcement provisions of the Federal Trade Commission Act (prior to 1938 amendment) were later considered by the court of appeals for the Seventh Circuit in *Federal Trade Comm. v. Fairyfoot Products Co.*, 94 F.2d 844 (1938). There, as here, it appeared that the respondent (Fairyfoot Company) "in fact had desisted from the objectionable practices long prior to the issuance of the 'cease and desist' order". The court defined its jurisdiction and function upon review as follows:

"Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41 et seq., the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the 'cease

and desist' order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. \* \* \*

"Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.'

"The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein. \* \* \*

"The necessary conclusion from the decisions of this circuit, and we believe from a proper construction of section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.

"Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one

- proceeding the various questions which section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals."

In other cases similarly arising the courts have granted enforcement, as a matter of discretion, where the circumstances indicated a threat of future violation.

In *Butterick Co. v. Federal Trade Comm.*, 4 F. 2d 910 (2nd Cir., 1925) the respondent petitioned for review and the Commission filed a cross-petition for enforcement. It appeared that Butterick was continuing to do business under the contracts held in violation of the Clayton Act. The court granted enforcement but stated that it would not have done so if there had been no violation of the order and if there were no threat of renewal of the unlawful practice. It was stated (p. 913):

"The jurisdiction of the court in this proceeding is original rather than appellate, and, since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. *Silver Co. v. Federal Trade Commission (C. C. A.)* 292 F. 752. The decree should be along the lines adopted by the courts of equity in hearing suits of injunction. It is the general practice in such cases that, if the defendant is continuing or threatening acts, there will be an injunction, but, if whatever was unlawful ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice."

In *National Silver Co. v. Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937) the court granted enforcement after affirmance on petition for review for the stated reason that petitioner was asserting the right to continue the practice forbidden, in spite of petitioner's showing that it had discontinued the misleading marking of its products prior to the issuance of the order.

It is noteworthy that the *Butterick* case, the *National Silver* case and the present case were all decided by the Second Circuit. These three cases illustrate the exercise of the discretion of the same court in granting or denying enforcement under differing circumstances. In all cases where the question has been discussed the courts have treated the granting of enforcement after affirmance on petition for review as discretionary and in each case have set forth the reasons for the exercise of their discretion in issuing or denying an injunction.

Having found no support in the decisions under the Clayton Act, the Solicitor General points to the decisions under the National Labor Relations Act holding that the Labor Board is entitled to enforcement of its orders upon affirmance. The enforcement provisions of Section 10(e) of the Labor Relations Act. (29 U. S. C. 160(e)) are quite different from those of Section 11 of the Clayton Act. Section 10(e) permits the Board to apply to the court for enforcement directly upon issuance of a cease and desist order, and enforcement is conditional only on the validity of the order. Even when the respondent petitions for review the jurisdiction of the court is "to enforce, modify and enforce as modified, or set aside" the Board's order. Since a valid order is the only statutory condition of enforcement, the Board has been held entitled to enforcement upon affirmance, and this condition is equally satisfied whether the affirmance be upon application by the Board or petition by the respondent. Under the Clayton Act, an application for enforcement is conditioned on non-compliance with the order. There, likewise, the Commission is entitled to enforcement if non-compliance with a valid order appears or is shown, whether the proceeding originates upon application for enforcement or upon petition for review. But if the statutory conditions are not satisfied



enforcement may be granted only within the limits of the discretion of the court having jurisdiction of the proceeding.

There is no question here of this proceeding having become moot. The decision below was not on that ground. It may be conceded that discontinuance of the practice found unlawful, even prior to the issuance of the order, does not make the case moot and is no bar to enforcement where the court finds other indication of threatened non-compliance. (*National Silver Co. v. Federal Trade Comm.*, 88 F. 2d 425 (2d Cir., 1937).) The order here, and the decree affirming it, remain in full force and effect, and enforcement, if the occasion arises, will have been expedited by the prior adjudication of its validity.

### **The Decisions of the Courts of Appeals Are Not in Conflict.**

There has been no "changing trend" in judicial interpretation of the enforcement provisions of Section 11 of the Clayton Act, nor is there a "newer and more direct procedure", as stated by Judge Clark in his dissent below.

The courts have *always* made non-compliance a condition precedent to the granting of enforcement in a proceeding arising upon application of the Commission—not merely a *threat* of non-compliance, but actual non-compliance with the order after issuance. In no such case cited either by Judge Clark or in the petition here, was enforcement granted except upon evidence or admission of non-compliance. The Solicitor General seems to concede that this is the rule.

Where jurisdiction has been obtained on petition by the respondent for review, and the order has been affirmed in whole or in part, the courts have *never* denied enforcement

solely for lack of a showing of prior violation; and enforcement was not denied on that ground here. In the cases so arising the courts have *always* treated enforcement as discretionary and have made the issuance of an injunction depend upon *indication of a threat of future non-compliance*. Of course, in these cases, if prior non-compliance appears, or if the allegations of a cross-petition are not denied, or if the respondent makes no claim of compliance and does not oppose enforcement, an injunction will issue. Most of the cases cited here and in the dissent below are of that type. Such cases prove nothing except that where violation of the order is admitted or enforcement is not opposed the court is justified in inferring a threat of future violation and in granting an injunction.

The Solicitor General cites two decisions of this Court in support of the assertion that the courts have "regularly commanded obedience" to orders upheld on petition for review without regard to compliance: *Federal Trade Comm. v. Cement Institute*, 333 U. S. 683, and *Federal Trade Comm. v. A. E. Staley Co.*, 324 U. S. 746. In the *Cement* case the principal charge was conspiracy in violation of the Federal Trade Commission Act, although there was a subsidiary charge of Clayton Act violation. Under the former Act (as amended) the court had no discretion as to enforcement, and the question was not discussed. Furthermore, in both the *Cement* and *Staley* cases, the Clayton Act violations resulted from basing point pricing, and in both cases the Commission's order had been reversed by the court of appeals. The continued use of the forbidden pricing practices pending review by this Court was to be assumed in the absence of denial, and was in fact well known. In the *Staley* case, the Commission filed a cross-petition for enforcement in the court of appeals, charging that Staley had failed and neglected to comply with the order, and this

charge was not denied. It thus appears that in each of these cases this Court directed enforcement upon evidence of actual violation of the order upheld.

Going back thirty-seven years under the Clayton Act, and the Federal Trade Commission Act prior to 1938, it seems that in only four cases (including the present case) has a court been called upon to decide the propriety of issuing an enforcement decree upon an affirmative showing that the respondent had complied with the order in so far as valid, had discontinued the unlawful practice before the order was issued, and was not threatening to renew it. The rarity of such cases emphasizes the lack of importance of the present case. The prior cases are *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923); *Fairyfoot Products Co. v. Federal Trade Comm.*, 80 F. 2d 684 (7th Cir., 1935), petition to punish for contempt dismissed, *F. T. C. v. Fairyfoot Products Co.*, 94 F. 2d 844; *National Silver Co. v. Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937). In the first two cases an injunction was denied; in the third case the court found other indication of a threat of violation and granted enforcement. In each case the matter was held to be one within the discretion of the court on the facts before it, and there is no case to the contrary.

A similar factual showing was made in three other cases wherein an order was affirmed on petition for review, but in none of them does enforcement appear to have been asked or granted. *Sears, Roebuck & Co. v. Federal Trade Comm.*, 258 Fed. 307 (7th Cir., 1919); *Guarantee Veterinary Co. v. Federal Trade Comm.*, 285 Fed. 853 (2nd Cir., 1922); *Fox Film Corp. v. Federal Trade Comm.*, 296 Fed. 353 (2nd Cir., 1924). If there has been any "changing trend," it is in the recent tendency of the Commission to regard every petition for review as a self-incriminating document sufficient in itself to call for the exercise of the injunctive

powers of the court. That was the attitude taken below, where it was asserted: " \* \* \* implicit in the petition for review petitioner has served notice that it intends to continue the unlawful practices until this court by a decree of enforcement compels it to discontinue such practices".

Judge Clark's dissenting opinion below is the first opinion written during the thirty-seven years since enactment of the Clayton Act, tending to support the Commission's present contention. Even Judge Clark admitted that the court had a choice in the matter. Having finally obtained a dissenting opinion by a single judge, the Commission has deemed it opportune to present the question to this Court in a case otherwise woefully weak both as to the merits of the order and as to the need for enforcement. If it be accepted that the court below had any discretion to refuse enforcement, then certainly that discretion was not abused.

**Petitioner Is Asking This Court to Amend the Statute. The Question Presented Is for Congress, Not the Courts.**

The petition for certiorari states (p. 8) that the enforcement provisions of the Federal Trade Commission Act as originally enacted "are [not "were"] virtually identical with those of the Clayton Act." The petition fails to disclose that the Commission went to the Congress in 1938 and obtained an amendment of the former act in the respect in which it is here asking this Court to amend the Clayton Act by construction. Then, at page 15, the petition states, "It is well settled that an order issued by the Commission under the Federal Trade Commission Act will be enforced, even though the practices thereby prohibited had been discontinued prior to issuance of the Commission's order",



citing recent decisions under the Federal Trade Commission Act as amended. This is, to say the least, misleading.

The facts are that in 1938 Congress amended Section 5 of the Federal Trade Commission Act, striking out the provision for enforcement upon application of the Commission, making the Commission's orders final unless the respondent petitions for review within 60 days, and prescribing penalties for violation. A clause was also added directing the Court of Appeals to issue a decree of enforcement in the event of affirmance upon review. The latter amendment would, of course, have been unnecessary if it had been true, as now asserted by the Solicitor General, that "the courts, to the extent that they have found the Commission's orders valid, have regularly commanded obedience thereto".

The original provisions of Section 11 of the Clayton Act have not been changed. If the Commission feels that the procedure provided by the latter Act is too lenient or unduly cumbersome, then, as stated by the court in *Federal Trade Comm. v. Standard Education Society, supra*, its complaint should be addressed to Congress and not to this court.

The complaint against the decision below is not a new one. The Commission has been making the same complaint in the courts of appeals for the past thirty years, and has always been rebuffed. (See *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752, 753, 754, where the Commission in 1923 relied on this Court's mandate in *Federal Trade Comm. v. Beech-Nut Packing Co.*, 257 U. S. 441, 456, to the same effect and issued under the same circumstances as its mandate in the *Cement Institute* case cited here.) It is obvious that this petition for certiorari was encouraged solely by Judge Clark's dissent below, which frankly ad-

vocates that the 1938 amendments to the Federal Trade Commission Act be adopted as a guide for judicial remodeling of the Clayton Act. It is understandable that after thirty ~~leat~~ years without even a dissent in its favor the Commission is anxious to press this doubtful advantage even in an otherwise weak and unimportant case.

The Commission's principal and primary complaint in the past has been that it is required to allege and prove non-compliance with its cease and desist orders before it can obtain an injunction upon its own application. That statutory requirement is here conceded by the Solicitor General. He is now seeking to obtain a half loaf for the Commission, where only a whole loaf will suffice. For reasons hereinbefore stated, the construction urged, to be applied only in proceedings on petition for review, would make the enforcement procedure illogical and lopsided and probably would add to the enforcement burden of the Commission. The Commission's recourse is to Congress, not to this Court.

### Conclusion.

This case is of no general interest or importance. It involves only the local pricing policies of a single company, engaged in ten years ago and not shown to have been continued thereafter. In its procedural aspect it presents a factual situation which has arisen not more than half a dozen times in thirty-seven years and will infrequently arise again. The decision on rehearing below is not in conflict with any decision of this Court or with any prior decision of a court of appeals. The question presented for review is one of policy which properly should be presented to Congress and not to the courts.

Furthermore, the order to cease and desist is too broad in scope, and the Court of Appeals has stated in its original

opinion that it will not enforce the order according to its terms. A mandate by this Court to enforce would imply approval of the terms of the order by this Court.

It is submitted that there is no occasion for further review of the decree below, and that the petition of the Solicitor General for writ of certiorari should be denied.

Respectfully submitted,

AUSTIN & MALKAN,  
*Attorneys for The Ruberoid Co.*

By: CYRUS AUSTIN

December 26, 1951.

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IN THE  
**Supreme Court of the United States**

October Term, 1951

No. 448

FEDERAL TRADE COMMISSION,  
*Petitioner,*

*against*

THE RUBEROID CO.,

*Respondent.*

No. 504

THE RUBEROID CO.,

*Petitioner,*

*against*

FEDERAL TRADE COMMISSION,

*Respondent.*

**BRIEF FOR THE RUBEROID CO.**

APPELL, ~~AUSTIN~~ & GAY,  
*Attorneys for The Ruberoid Co.,*  
30 Rockefeller Plaza,  
New York 20, N. Y.

CYRUS AUSTIN,  
*Of Counsel.*



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Appendix 1. Sections 2(a) and 2(b) of the Clayton Act, as Amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A., sec. 13).

Section 11 of the Clayton Act (Act of October 15, 1914, 38 Stat. 734; 15 U. S. C. A., sec. 21).

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IN THE  
**Supreme Court of the United States**  
October Term, 1951

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**No. 448**

FEDERAL TRADE COMMISSION,

*Petitioner,*

*against*

THE RUBEROID CO.,

*Respondent.*

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**No. 504**

THE RUBEROID CO.,

*Petitioner,*

*against*

FEDERAL TRADE COMMISSION,

*Respondent.*

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**BRIEF FOR THE RUBEROID CO.**

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**Opinion Below.**

The opinion of the court of appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

**Jurisdiction.**

The jurisdiction of this Court is invoked under Title 15 of the United States Code, Section 21, and Title 28 of the United States Code, Section 1254(1). The final decree of the court of appeals, here for review, was entered on September 5, 1951 (R. 123). Certiorari was granted herein January 28, 1952.

### **Statutes Involved.**

Sections 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act (Act of October 15, 1914, as amended by Act of June 19, 1936, 49 Stat. 1526; 15 U. S. C., sec. 13); Section 11 of the Clayton Act (Act of October 15, 1914, 38 Stat. 734; 15 U. S. C., sec. 21). The relevant portions of these sections are printed herewith as Appendix A.

### **Statement of the Case.**

The Federal Trade Commission issued a cease and desist order against The Ruberoid Co. on January 20, 1950, in a proceeding upon complaint charging said respondent with price discrimination in violation of Section 2(a) of the Clayton Act. The Ruberoid Co. petitioned the court of appeals for review pursuant to Section 11 of that Act, asserting that the order was too broad in scope and asking that it be modified. The Commission filed no application or cross-petition for enforcement, and made no charge of non-compliance. However, at the end of its brief in opposition to modification it requested the court "pursuant to the statute" to enter a decree commanding compliance. The court of appeals affirmed the order, but, on rehearing, declined to grant an injunction. Cross-petitions for certiorari were granted by this Court.

For the sake of clarity The Ruberoid Co. hereinafter will be referred to as "petitioner", and the Federal Trade Commission as the "Commission".

### **The Facts.**

The Commission's complaint, dated July 26, 1943, alleged that petitioner was engaged in the business of manufacturing and selling asbestos and asphalt roofing, insulat-

ing material and allied products throughout the United States, selling its products directly to wholesalers, retailers and applicators (R. 1). "Applicator" is the trade term for a roofing contractor who applies roofing materials to buildings on a contract basis, the price charged covering the materials used and the labor employed on the job (R. 2). It was alleged that petitioner had granted certain trade discounts to some purchasers of its products, not allowed other competing purchasers; and that the effect of such discriminations had been, or might be, substantially to lessen, injure, destroy or prevent competition between such purchasers.

Hearings were not held until after the war, in 1946. The Commission introduced testimony and invoices showing that during the year 1941, in New Orleans, Louisiana, petitioner had allowed a discount of 5%, and in some cases 7½%, to four customers functioning as applicators or as retailers, in addition to the discounts then allowed other applicators and retailers in that area (R. 60-65). No evidence of discrimination at any other time or place was offered. It appeared from the evidence adduced by the Commission that the allowance of these 1941 discounts resulted from competitive conditions local to New Orleans, that petitioner's pricing policy there was not indicative of its pricing elsewhere, and that at the time of the hearings in 1946 petitioner was selling to only five customers in New Orleans (the four previously favored and one wholesaler), selling to all on the same terms regardless of function or quantity (R. 20).

Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. Proposed findings and conclusions were agreed upon, except as to one point, between the

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opposing attorneys, and were submitted to and adopted by the trial examiner (R. 60-65). The sole point of dispute was whether the evidence established discrimination in price between wholesalers, and on this point the Commission upheld petitioner (R. 84). After briefs and argument (turning principally on the scope of the order to be issued) the Commission made its "findings as to the facts" and ordered petitioner to cease and desist from discriminating in price in the sale of its roofing materials in commerce

"By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

Petitioner duly petitioned the court of appeals for review and modification. Petitioner did not contest the Commission's factual findings, or its conclusion that the price discriminations established in New Orleans were unlawful. It took the position below, and asserts here, that the order is invalid as a matter of law; in that it prohibits *all price differentials*, however, small, in the prices charged competing purchasers at any level of competition, that such differentials are at most prima facie unlawful under the statute, and that there is no exception or proviso affording petitioner an opportunity to justify or defend them if charged with violation.

The Commission admitted that this order was a radical departure from its prior orders in like cases; at least no similar order has previously reached the courts. During its fifteen years' administration of the Robinson-Patman Act the Commission's orders under Section 2(a) have consistently included an exception or proviso permitting differentials justified by cost differences, and many orders



have contained a proviso exempting differentials made in good faith to meet competition. Prior orders have limited the differentials prohibited to those found substantial or which may have the proscribed effect on competition. The Commission stated in its brief below that this case "represents another milestone in the Commission's effort to establish a fair and just interpretation of the Robinson-Patman Act". The pertinent provisions of representative orders issued by the Commission in "competing purchasers" cases during the past ten years are set forth in Appendix 2 of this brief for purposes of comparison.

The Commission was forced to concede that as to differentials of a different character or granted under different circumstances than those established petitioner should have the right to assert the defenses which the Act permits, and assured the court that it was not its intention to seek enforcement of this order beyond the boundaries of the statute. Apparently accepting these assurances the court refused modification, but stated in its opinion that, if subsequently charged with violation of the order, petitioner would not be denied the right to avail itself of the defenses which the Act provides. The opinion states (R. 97):

"Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discrimination and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have

the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

And upon rehearing the court said further (R. 118):

"Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to introduce in its defense evidence that the conduct complained of was permitted by exceptions contained in the Clayton Act itself as amended. This, as we understood its position, was substantially all petitioner desired."

As to the prohibition of all price differentials without regard to effect on competition, the court held, relying on this Court's decision in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, that "it is quite clear that an order may legally prohibit all differentials". The court stated that, assuming that the Commission might have found differentials of less than 2½% to be immaterial under the evidence, "we cannot force such a finding upon it".

The court of appeals did not include in its decree a provision enjoining violation of the terms of this order. The Commission filed no formal application or cross-petition for enforcement. At the end of its brief it made a bare, unsupported request that an injunction issue "pursuant to the statute", citing and quoting a provision of the Federal

Trade Commission Act having no application to this proceeding. No violation or threat of violation of the order was charged, and no facts claimed to indicate need for an injunction were called to the court's attention.

On the initial hearing the question of enforcement was not argued, and the court upon affirming the order added the words "enforcement granted". Respondent thereupon petitioned the court for rehearing, pointing out that the Commission was not entitled to an injunction as a matter of right or of course, and asking the court in the exercise of its discretion to deny enforcement on the ground that the practices found unlawful by the Commission had long since been abandoned by respondent, that respondent had never asserted the validity of those practices or the right to renew them, and that there was no reason to apprehend renewal. The Commission opposed rehearing, but again was unable to point to any factual evidence of violation or threatened violation of its order within the limitations as to enforceability placed upon it by the court's opinion. The court granted the petition for rehearing and struck the words "enforcement granted" from its decision. A decree was thereupon entered affirming the order, without injunctive provisions.

### Questions Presented.

1. The Federal Trade Commission, in a proceeding under Section 2(a) of the Clayton Act, having established certain differentials in the prices theretofore charged by petitioner to competing purchasers of its roofing materials in certain local transactions, and petitioner having offered no evidence that said differentials were justified by differences in its costs, and the Commission having found that said differentials constituted unlawful discriminations in

price, may the Commission thereupon validly prohibit all differentials of any character or amount in the prices charged competing purchasers anywhere without regard to whether such differentials make only due allowance for differences in petitioner's cost of manufacture, sale or delivery resulting from differing methods or quantities of sale or delivery?

2. The respondent in a proceeding under Section 2(a) of the Clayton Act having failed to justify its lower prices as having been made in good faith to meet competition, and the Commission having found that certain of such prices were unlawfully granted, may the Commission validly prohibit all future differentials between competing purchasers without exception or exemption of lower prices thereafter made in good faith to meet the equally low and lawful prices of competitors?

3. The Commission having found that the record does not establish discrimination in price by petitioner between wholesalers, and having made no finding as to what differential in the prices charged competing wholesalers would or might be sufficient in amount to substantially affect competition, may the Commission validly prohibit any differential whatever in petitioner's prices to competing wholesalers under any competitive conditions anywhere?

4. May the Commission validly issue an order having the effect of prohibiting any price differential in the sale of roofing materials to competing manufacturers of prefabricated housing, without any allegation, proof or finding as to what differential in the prices charged such manufacturers would be sufficient to substantially affect competition?



5. In a proceeding upon petition filed pursuant to Section 11 of the Clayton Act for review of a cease and desist order of the Federal Trade Commission, wherein the Commission makes an application or request for enforcement of the order, and wherein the petitioner denies that it has failed or neglected to comply with the order or intends to do so, does the statute make it mandatory for the court of appeals to issue a decree enjoining violation of the order to the extent affirmed, irrespective of any showing of non-compliance or present threat of non-compliance?

6. If enforcement is discretionary in the absence of such a showing, did the court abuse its discretion in denying an injunction where compliance with the order was not in dispute and where the Commission offered no evidence of threatened non-compliance other than its finding that petitioner had violated the Act ten years previously?

## ARGUMENT.

### I.

**The order invalidly prohibits differentials which are not unlawful under the Act.**

Not all differentials in the prices charged by a seller of a commodity to purchasers competing in the resale thereof are unlawful under Sections 2(a) and (b) of the Clayton Act. Such differentials are not prohibited (1) if neither of the sales involved is in commerce, (2) if the goods are not of like grade and quality, (3) if the differential is not one the effect of which may be substantially to lessen or injure competition, (4) if the differential makes only due allowance for differences in the seller's costs resulting

from differing methods or quantities of sale or delivery, or (5) if the lower price was made in good faith to meet the equally low price of a competitor.

The Commission limited this order to sales made in commerce and to roofing materials of like grade and quality, but with those limitations the order prohibits any differential whatever in the prices which petitioner may charge any competing purchasers anywhere, without regard to probable or even possible effect on competition, without regard to cost justification, and without regard to competitive situations. The order is not indefinite or ambiguous and does not require construction. We submit that an order which expressly prohibits what the enabling Act permits is invalid as a matter of law and should not stand.

We believe that in every prior order issued by the Commission since the passage of the Robinson-Patman Act, prohibiting discrimination between competing purchasers, the Commission either has excepted differentials justifiable by cost differences in the affirmative portion of the order or has added a proviso exempting them. The Commission has recognized, prior to this case and since, that a finding that certain differentials are sufficient in amount to substantially lessen or injure competition will not support an order prohibiting substantially smaller differentials, even between purchasers of the same functional class. (See Appendix 2 of this brief.) Many of its orders have contained a proviso exempting differentials made in good faith to meet competition, although prior to this Court's decision in the *Standard Oil* case (340 U. S. 231) the Commission did not construe the proviso of Section 2(b) of the Act as offering a complete defense. It thus appears

that this order presents a radical change in the Commission's interpretation of the limits of its own prohibitory powers.

The metamorphosis of the Commission's orders in Robinson-Patman Act cases and the vacillation of its policy on the inclusion of provisos are discussed and analyzed in an article in the current issue of the Harvard Law Review, wherein the author refers to "the recent drastic and complete reversal of Commission thinking as to the future availability of these three defenses to disprove charges of violation of the order." \*

The question here presented is not one of appropriate remedy. This is not a case where the order prohibits other *unlawful* acts reasonably related to those found unlawful (*National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 436). Neither is this an instance of prohibition of practices not lawful in themselves but found to have been used for an unlawful purpose. It can hardly be contended that the Commission is justified, as a matter of remedy, in prohibiting *all price differentials* between competing customers in order to effectively prevent unlawful discriminations.

The principal contention made below in support of this order was that since petitioner had not offered evidence at the hearing to establish cost justification or the good faith meeting of competition it was "foreclosed" from raising those issues in any proceeding for enforcement of the order. This wholly ignores the fact that a cease and desist order

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\* Shniderman, "Federal Trade Commission Orders Under The Robinson-Patman Act: An Argument For Limiting Their Impact on Subsequent Pricing Conduct", 65 Harvard Law Review 750 (March, 1952).

looks to the future, and that the prohibitions of this order extend far beyond the differentials which were litigated and found unlawful in New Orleans. The violations charged were differentials of 5% and 7½% in the prices charged New Orleans applicators and retailers. Petitioner could not have defended this charge by showing that a differential of 2% between certain of its customers, even in New Orleans, would have been justified by cost differences; yet future differentials in that amount or any amount are prohibited. Petitioner could not have defended by justifying its carload or other quantity discounts, since such discounts were not involved. Obviously it could not have defended by showing that a lower price made to one of several competing customers in some other locality was made in good faith to meet competition, nor could it have justified in advance the necessity for meeting new competitive situations as they arise. This order, nevertheless, extends to all such situations.

It is true that petitioner asserted the defenses of cost justification and meeting competition in its answer, and offered no proof in support thereof. That is material only as to the finding of past violations, which are not in dispute. Petitioner did raise before the Commission the questions here presented as to the scope of the order (Petitioner's exceptions 24 and 25 to the trial examiner's recommended decision, R. 83). The Commission's position seems to be that, having proved that petitioner had unlawfully discriminated between *certain* competing purchasers, it was justified in assuming that *any* differential between *any* competing purchasers was and would be equally unlawful in the absence of proof to the contrary. This would mean that a seller confronted with a single violation would have the impossible burden of justifying every differential,



every discount, and every competitive situation throughout its entire business at pain of being enjoined from doing what the statute permits.

**Petitioner Would Be Unable to Do Business Under an Order Denying it the Defenses of Cost Justification and Meeting Competition.**

As to cost justification, it should be sufficient to point out that the order prohibits all quantity differentials. Roofing materials are heavy goods, and freight and transportation costs are very substantial. This order would prevent petitioner from granting a discount to customers purchasing in carload lots. The record shows that petitioner sells its products in carload and less than carload quantities, at different prices (R. 17-18). This carload differential was not involved in the transactions attacked in this proceeding, and petitioner had no occasion to justify it. Yet this order would require petitioner to sell to all competing customers at one price, regardless of quantities purchased or method of sale or delivery. For example, petitioner would be prevented from selling its products to a private brand customer at a differential reflecting the saving of advertising and selling costs which are incurred in the sale of branded merchandise. The Commission has always recognized the validity of differentials reflecting such cost savings.

This order would also prevent petitioner from meeting competition in good faith by defending itself against a competitor's raid on a customer, which this Court has held that it has a right to do. In *Standard Oil Company v. Federal Trade Comm.*, 340 U. S. 231, this Court held that meeting the equally low price of a competitor in good faith is an absolute defense to a charge of unlawful price discrimina-

tion, at least where the price met is a lawful price. We believe this is the first case to reach the courts, since that decision, presenting the question whether a Section 2(a) order prohibiting price differentials between competing purchasers must include a proviso exempting differentials made in good faith to meet competition.

The fact that petitioner did not sustain the defense of meeting competition at the hearings in this case is no reason for denying it that defense in the future. Let us assume that petitioner is now selling its roofing materials to applicators and retailers in New Orleans at identical prices, in compliance with the order; and that tomorrow a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. Under such circumstances petitioner's customers would be easy prey to competition.

**The Order Should Be Definite and Certain. It Is No Answer to Say that the Statutory Exceptions May Be Availed of in the Event of "Changed Circumstances."**

The Commission made the hedged concession below that upon the basis of changed facts or circumstances petitioner should have the right to assert the defenses which the Act permits. It suggested that if in the future petitioner should claim that certain prohibited differentials are lawful it might then resort to the Commission or to the court for modification of the order. It assured the court that it would not institute enforcement proceedings without first giving petitioner an opportunity to demonstrate to the Commis-

sign that its prices were justified by cost differences or by competition. Apart from the illusive character of such assurances, the fault with this order is that it prohibits differentials which were lawful when the order was issued and are lawful now. It is no answer to say that correction of present invalidity should be postponed to the future. Petitioner is entitled to know now what this order prohibits so that it can carry on its business accordingly.

The court of appeals refused modification, but stated that "no contempt can be found for legally permissible acts"; and that "it is surely not necessary to repeat the wording of the statute in the order itself". This reassurance, at best indefinite, was qualified. After pointing out that petitioner had not offered evidence in justification of the discriminations proved, the court continued

"Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

Upon rehearing the court again indicated that in a subsequent enforcement proceeding involving alleged violations arising under "different circumstances" petitioner would be able to introduce in defense evidence that the differentials complained of were permitted by the exceptions contained in the Act (R. 118-119).

As we read these pronouncements they mean that (except as to differentials given under the same "circum-

stances" as those previously found unlawful) petitioner may violate the order with impunity so long as it complies with the law. This would be of doubtful benefit since the Act itself (in the language of the court) "is vague and general in its wording" and "cannot be translated with assurance into any detailed set of guiding yardsticks".

Judged by the tests applicable to injunctions, the proposed construction of this order does violence to established principles of equity jurisprudence. It is, of course, fundamental that a valid injunction must be sufficiently definite and specific so that the person enjoined may look to the injunction to ascertain what is necessary for compliance. This cease and desist order is definite and specific—and so read is invalid; yet the court of appeals has attempted to save it by giving notice that it will not be treated as meaning what it says if an attempt is made to enforce it. The court says that it is unnecessary to write the statutory exceptions into the order, but that, if called upon to enforce, it will read these exceptions in "to the extent that they are legally applicable".

The opinion below leaves the question of compliance with the order in a jumble of confusion and doubt. Petitioner must now guess to what extent the statutory defenses and provisos will be deemed "legally applicable" if it is charged with a violation of the order. It must guess what differentials the Commission and a differently constituted court will find to be "legally permissible" under the statute. It must guess whether pricing and competitive situations existing today, or which may arise tomorrow, present a sufficiently "definite change of circumstances" to warrant



"a new hearing on the facts". We submit that no business concern should be required to conduct its affairs under such a fiat."

In an enforcement or contempt proceeding upon a charge of violation of an injunction the issue of violation is to be determined upon the terms of the injunction, not by reference to the law under which the injunction was issued. This precise question was presented in a recent case arising under the California Unfair Practices Act. *People v. Gordon*, 234 P. 2d 287 (California District Court of Appeals, July, 1951). That Act prohibits selling below cost "for the purpose of injuring competitors or destroying competition". In an action by the State to restrain alleged violations the court issued a preliminary injunction prohibiting the defendant from selling below cost, without qualification. In granting modification the appellate court said:

"Respondent's contention that all restrictions and exceptions provided for in the act should be considered incorporated by implication and that appellant cannot be prejudiced because insofar as an action covered by the injunction would not violate the act the injunction could not be enforced by contempt

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"The business man will continue to be baffled, for he will not find in the four corners of the order reference to defenses he has been informed are sometimes available and sometimes not. The line of demarcation, he will learn from counsel, is far from clear; the important decision is whether a pricing practice falls within the scope of things 'foreclosed', or more appropriately reflects pricing under a 'definite change of circumstances.' It is in this area of distinction that the Second Circuit's concession to enforcement simplicity will cause an unwise legal development unless the nature of matters deemed foreclosed is narrowly confined." Shniderman, "Federal Trade Commission Orders Under The Robinson-Patman Act: An Argument For Limiting Their Impact on Subsequent Pricing Conduct", 65 Harvard Law Review 750, 768 (March, 1952).

proceeding is without merit. Defendant must be able to determine from the injunction what he may and may not do. (*Gelfand v. O'Haver*, 33 Cal. 2d 218, 222 [200 P. 2d 790]; *Morris v. George*, 57 Cal. App. 2d 665, 667 [135 P. 2d 195]). When the injunction is too broad restriction should not be left to a construction with the aid of the statute. We shall therefore modify the injunction so as to contain the required restriction."

In the court below the Commission expressed apprehension that, if provisos are inserted in the order, and if it should later charge petitioner with violation, it would have the burden of proving that the discriminations charged were not justified by cost differences or by meeting competition. This point was raised only by the Commission, not by petitioner as erroneously stated in the opinion (R. 97). The Commission has been inserting these provisos in its orders ever since the Robinson-Patman Act was passed, without apparent hindrance to enforcement. Presumably the seller would have the burden of establishing affirmative defenses under provisos of a cease and desist order or injunction, to the same extent as under provisos of a statute. Whether that is true or not, the question is not presented here.

This order should, at the least, be modified by the insertion or addition of exceptions or provisos unequivocally excluding differentials which are permissible under the cost justification and meeting competition provisos of Sections 2(a), and (b) of the Clayton Act.

## II.

The order should be limited to the prohibition of differentials between purchasers competing as applicators or as retailers.

The price discriminations found by the Commission (Findings, Paragraph Four) were between purchasers of petitioner's products "competing in the resale of these products as roofing contractors or applicators and as retailers" (R. 89). The Commission ruled and found that the record does not establish discrimination by petitioner among wholesalers (R. 84, 89). These findings, of course, are conclusive and are binding upon the Commission here. It is therefore unnecessary to examine the evidence on these points.

It is clear, then, that the facts as found do not support an order prohibiting differentials between purchasers competing other than as applicators or as retailers, on the basis of past violations. Nevertheless this order prohibits *any* price differential between purchasers competing by *any* method or at *any* level of competition in the resale or distribution of roofing materials, including wholesalers, jobbers and manufacturers. A quantity or cash discount of 1% or 2%, or even  $\frac{1}{2}$  of 1%, between competing wholesalers would violate this order. There is no allegation or evidence of sales by petitioner to manufacturers—yet petitioner might be held in violation of this order if it sold shingles or siding at slightly different prices to two competing manufacturers of prefabricated houses. Such a manufacturer is engaged in the "resale or distribution" of roofing materials to the same extent as an applicator who is paid for constructing a roof. All such differentials

are prohibited by this order without regard to whether any given differential would or could substantially affect competition between the purchasers concerned.

The issue presented is whether and to what extent the Commission, having established that certain differentials in the prices charged competing purchasers of one functional class were substantial in their effect on competition at that level, may properly issue an order prohibiting differentials of lesser amount or any amount between purchasers of other functional classes competing under different competitive conditions.

The discriminations in price affirmatively prohibited by Section 2(a) of the Clayton Act include only those

“where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.”

The statutory test is *substantial* adverse effect upon competition, not whether the purchasers charged different prices are competitors in the resale of the goods. Where the competition alleged to be affected is between sellers, the discrimination need not be between competing purchasers to fall within the statute. (Cf. *Muller & Co. v. F.T.C.*, 142 F. (2d) 511 (6th Cir., 1944); *Moss, Inc. v. F.T.C.*, 148 F. (2d) 378 (2d Cir., 1945).) And even where competing purchasers are concerned, the discrimination is not unlawful unless the difference in prices charged is sufficient in amount to confer a substantial competitive advantage on the favored purchaser. Whether such a



differential is one which may substantially lessen or injure competition is a question of fact in every price discrimination case, and a question on which the Commission or plaintiff has the affirmative.

We are not here concerned with the requirements of a prima facie case. It may be that, as stated by the court in *Moss, Inc. v. Federal Trade Commission*, *supra*, Section 2(b) of the Clayton Act has the effect of "shifting the burden of proof to anyone who sets two prices", and that proof of even a small differential in the prices charged competing purchasers is enough to throw upon the respondent the burden of showing that such differential would not substantially affect competition. Assuming that to be true, the Commission itself has found that this record does not establish discriminations in price between wholesalers. Prima facie evidence is subject to rebuttal; and petitioner had no occasion to offer evidence as to the effect of discriminations not established. It would have no such opportunity if charged with violation of this order. The question here is not whether the Commission may prohibit established differentials between competing customers in the absence of rebuttal evidence; the question is whether it may prohibit differentials *other and less than those established*, without evidence and findings that such differentials might substantially affect competition if granted.

The Commission has recognized in prior cases that not all price differentials between competing purchasers are sufficiently substantial in their effect on competition to amount to unlawful discriminations. In *Matter of Kraft-Phenix Cheese Corp.*, 25 F. T. C. 537, it appeared that Kraft gave a 3% discount on packaged cheese and salad products to retailers buying more than \$5.00 worth in a

single purchase, and that an appreciable number of retailers did not obtain the discount. After referring to evidence that the 5% differential did not materially affect retail prices or result in any appreciable diversion of trade or impairment of profits, the Commission concluded "that such price differentials do not tend to injure competition between retailers reselling said products". The complaint was dismissed.

Paragraph Five of the Findings (R. 89) contains what apparently is intended as an explanation for the issuance of this order in its present broad terms. After pointing out that one applicator resold to some extent to other applicators, and that another customer classified by petitioner as a wholesaler also engaged in business as an applicator, the finding states:

"The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers."

We agree that the action taken by the Commission should be sufficient "to stop the discriminations" which "the record establishes". The Commission has found that the discriminations established by the record were between purchasers "competing in the resale of these products

as roofing contractors or applicators and as retailers" (R. 89). We agree that the particular terms used by petitioner or by the trade to describe or classify these purchasers are immaterial.

We are here dealing with actualities. In using the terms "wholesalers", "retailers" and "applicators" we refer, and the order should refer, to purchasers in fact performing these respective functions in the resale or application of petitioner's products. Concededly, a customer who resells in part as a wholesaler and in part as an applicator or as a retailer (regardless of how classified) is not entitled to a wholesaler's functional discount on the materials which he resells in applied form or at retail in competition with other applicators or other retailers. But the fact that some purchasers of roofing materials resell and compete at more than one functional level does not justify this order. That situation would be adequately covered and guarded against by an order limited to discriminations between purchasers *in fact competing in the resale or distribution of petitioner's products at retail or as applicators.*

Parenthetically it may be noted that the court of appeals also appears to have become confused on this point. The opinion states that "to many of us an 'applicator' who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler". The terms "wholesaler", "retailer" and "applicator" are well recognized and differentiated functional trade classifications. Classification of function is to be distinguished from classification of customer. Applicators resell to consumers (house owners) and in the performance of that function they bear no resemblance to wholesalers.

The error into which the Commission has fallen, and which is carried into the order, is demonstrated by the statement (in the paragraph of the findings above quoted) that "The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question". Having reached this conclusion the Commission proceeded to issue an order prohibiting all price differentials between competing purchasers. The error in the above statement, of course, lies in the omission of the word "unlawful". The controlling factor in the proceeding was that the record established *unlawful* price discriminations among competing purchasers. The discriminations established between applicators and between retailers were unlawful because found to be sufficient in amount to substantially affect competition. It does not follow that the same or lesser differentials would be substantial as to competition between wholesalers or between manufacturers, and there is no finding to that effect. Proof of certain price discriminations between purchasers of one functional class is not sufficient to support an order prohibiting any differentials whatever between any competing purchasers at any level of competition.

In the aspect now under consideration the invalidity of the order from a legal standpoint could be cured by addition of the single word "substantially" after "prices". The order would then prohibit only substantial price differentials, and the term "substantially" could be construed as referring to differentials which may substantially affect competition as defined in the statute. That, however, would not validate this order; since this Court has held in *Federal Trade Comm. v. Morton Salt Co.* (334 U. S. 37), that the Commission may not properly leave to subsequent enforce-



ment proceedings the determination of what differentials may be substantial in their effect on competition.

We believe that the court of appeals has fallen into serious error in interpreting this Court's decision in the *Morton Salt* case as making it "quite clear that an order may legally prohibit *all* differentials" (italics the court's). We do not so understand the decision. This Court there stated (pp. 53, 54):

"Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not in either (a) or (b) taken action which forbids such noninjurious differentials. But other objections raised to the qualifying clauses require consideration.

"One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to *make findings* concerning possible injury to competition. Such findings are to form the basis for cease and desist orders *definitely restraining the particular discriminatory practices which may tend to injure competition without justification.* \* \* \*

"Whether on this record the Commission was *compelled* to exempt certain differentials of less than five cents we do not decide. \* \* \*" (Italics supplied.)

We interpret this language to mean that a cease and desist order in a case such as this must be supported by evidence and *findings* that the effect of the differentials prohibited may be substantially to lessen or injure competition; that the Commission, as "a body of experts", may hear evidence and make findings as to the effect on competition of differ-

entials *less than those proved*, in order to provide a factual basis for an effective order; and that differentials not found sufficient to have a substantial adverse effect on competition must be excluded or exempted from the order. The Commission accepted and followed this construction of the *Morton Salt* decision in *Matter of F & V Manufacturing Co.*, 46 F. T. C. 632 (opinion and order March 14, 1950, two months after the issuance of the present order).

This case dealt with local price discriminations between applicators and between retailers. The testimony dealt entirely with competition in those functional classes. Only one exclusive wholesaler (Lyle) was called, and he was not questioned regarding competition. It is true that the Commission found that "Respondent recognized that a difference of 21½% was material to its customers in the possible diversion of trade" (R. 89); but it is clear from the context that the Commission was there speaking only of applicators and retailers.

In the opinion below it is said that "petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35". The position actually taken was, and is, that one who is found guilty of exceeding a 30-mile speed limit for traveling 50 miles per hour should nevertheless not be prohibited thereafter from traveling 20 miles per hour or less. The Commission's function is to set the price differential speed limit upon evidence and findings as to what differentials may substantially lessen or injure competition. Here no speed limit was set for wholesalers, and only as to applicators was the limit set at zero.

It is submitted that in the absence of any finding of discrimination between wholesalers or between manufacturers purchasing petitioner's products, and in the absence of any substantial evidence as to what differentials would be sufficient to affect competition between customers of those classes, the order should be limited to the prohibition of differentials between purchasers in fact competing as applicators or as retailers. *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426.

### III.

**The Court of Appeals properly declined to grant an injunction.**

#### **Introductory Statement.**

The petition for certiorari filed on behalf of the Commission presents a question of construction of the enforcement provisions of Section 11 of the Clayton Act. The pertinent provisions of that section are as follows:

"If such person fails or neglects to obey such order of the commission \* \* \* while the same is in effect, the commission \* \* \* may apply to the United States court of appeals \* \* \* for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, \* \* \*. Upon such filing of the application and transcript the court \* \* \* shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order \* \* \*."

"Any party required by such order of the commission \* \* \* to cease and desist from a violation

charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order \* \* \* be set aside. \* \* \* Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order \* \* \* as in the case of an application by the commission \* \* \* for the enforcement of its order, \* \* \*.

"The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission \* \* \* shall be exclusive."

This statute has been on the books for thirty-eight years, without amendment of these provisions. Pursuant thereto the courts of appeals have been called upon to review and enforce orders of the Commission in hundreds of cases. The decisions are not in conflict. That in itself provides strong reason for not disturbing at this late date a construction accepted and consistently followed for so long a time.

The Clayton Act and the Federal Trade Commission Act were companion statutes originally enacted in 1914. The provisions for enforcement and for judicial review of cease and desist orders of the Commission were the same in each, and remained the same until 1938. In 1938 the Commission sought and obtained an amendment of Section 5 of the Federal Trade Commission Act striking out the provision for enforcement upon application of the Commission, making the Commission's orders final after 60 days unless a petition for review is filed within that period, and prescribing penalties for violation. As amended, that section also provides that the court of appeals "shall have power to make and enter \* \* \* a decree affirming, modifying or setting aside the order of the Commission."



*and enforcing the same to the extent that such order is affirmed"; and that "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience of the terms of such order of the Commission."*

The courts did not differentiate between the enforcement and review provisions of the two statutes prior to 1938, and the decisions in Federal Trade Commission Act cases are equally in point on the questions here presented. The majority of the decided cases arose under that Act. The amendment in 1938 indicates that the decisions up to that time were not in accord with the construction which the Commission had theretofore urged and is now urging. Since that time the Commission has repeatedly asked Congress to amend Section 11 of the Clayton Act in the same respects. Bills to that end have been pending in Congress for a number of years. See F. T. C. Annual Report for fiscal year 1951, page 8.

The court of appeals here found it to be "settled that the F. T. C. cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent"; and held that where the application for enforcement is made as a cross-petition in a proceeding upon petition for review "the same showing of a threatened violation of its order" is required as if the proceeding had originated upon such application.

Petitioner assured the court that it had complied with the order (R. 106), and pointed to evidence in the record indicating its discontinuance of the discriminations found unlawful prior to the Commission hearings. Petitioner did not deny that those discriminations were prohibited by

the Act nor did it assert the right to resume them. It sought only modification of the order to the extent that the order prohibits what is not unlawful.

The Commission asserts that where the court of appeals affirms a cease and desist order issued under this section it is ~~the~~ *duty* of the court to issue a decree commanding compliance, regardless of any showing of actual or threatened violation; that the statute in effect makes an injunction upon affirmance mandatory. Apparently the contention is that if the court affirms the order in whole or in part upon petition for review it must decree enforcement even though no application therefor is made by the Commission,

These contentions are not new. The Commission has been chafing under the enforcement provisions of the Clayton Act and (prior to 1938) the Federal Trade Commission Act for thirty years. It has repeatedly made this same complaint in the courts of appeals and has always been rebuffed.<sup>1</sup> No court has held that this statute contains a mandate to the court of appeals to enjoin violation of a Commission order upon affirmance, where non-compliance is denied, without evidence that the order has been disobeyed or that disobedience is presently threatened. No court has held that it would be an abuse of discretion to deny enforcement under those circumstances. No court has held that the considerations governing enforcement are different in the case of a cross-application filed in a proceeding upon petition for review than in the case of an original application. As we will show, the decisions in the

<sup>1</sup> See *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752, 753, 754 (6th Cir.; 1923), where this precise issue was raised, and cases cited in subdivision "A" of this Point, *infra*.

several circuits are in accord. The cases do not support Judge Clark's reference (in his dissent below) to a "changing trend" in the decisions, toward a "newer and more direct procedure".

There is no factual issue as to petitioner's compliance with this order. In the court below the Commission made no charge or showing of non-compliance, actual or threatened. It asserts here that such evidence is immaterial, even where non-compliance is denied. The premise of the discussion here is that petitioner has fully complied with this order since its issuance and that there was before the court below no evidence of threatened violation other than the possibility of renewal of the price discriminations which the Commission found to have occurred in 1941, five years before the hearings and ten years before the application for enforcement was presented to the court.

In the court below the Commission took the square position that the necessity for proof of non-compliance depends upon whether the application for enforcement is an original application or a cross-application. In its answer to the petition for rehearing it stated that the statutory provision for enforcement upon its own application "specifically requires the Commission to prove a violation of its order before an enforcement decree will issue"; but that "no such requirement can be found in the provisions of the Act under which this proceeding was instituted" (R. 113). The Commission further stated that its prayer for affirmance and enforcement in the concluding paragraph of its brief was "in the nature of a cross-petition" (R. 111).

Apparently the Commission now recognizes the weakness of contending that Congress intended to make the con-

ditions for enforcement of Clayton Act orders depend on which party first takes the case to court. It is here asserted that even when the Commission originally applies for enforcement a showing of actual or threatened violation is not a condition of enforcement. We suggest that upon the answer to that question hinges the correctness of the decision below. If proof that the order has been violated, or that violation is presently threatened, is the statutory prerequisite for enforcement upon application of the Commission, then certainly Congress did not intend to impose that requirement only when the Commission finds it necessary to proceed for enforcement, and to penalize a respondent who complies with the order in so far as valid merely because he exercises his right to judicial review.

**A. A Finding of Non-Compliance or Presently Threatened Non-Compliance Is a Prerequisite to Enforcement Under Section 11 of the Clayton Act.**

The language of the statute is unequivocal:

"If such person fails or neglects to obey such order of the Commission \* \* \* the Commission \* \* \* may apply to the United States court of appeals \* \* \* for the enforcement of its order, \* \* \*".

There is no exception to this requirement. No other or different condition, or procedure for enforcement is provided. Enforcement may be had only if the person against whom the order is issued fails or neglects to obey it.

The courts have relaxed the requirement of proof of actual violation to the natural and proper extent of holding that enforcement will be granted, as well, upon evidence that violation of the order is presently threatened. One



who plans to violate is neglecting to obey. And, of course, where non-compliance has been admitted by failure to deny and enforcement has not been opposed, injunctions have issued without affirmative proof of violation. The courts of appeals have consistently adhered to the statutory requirement in cases where enforcement has been opposed on the ground that the order was complied with.

There is no magic in the term "enforcement". Until a person against whom an order is issued violates it or threatens to violate it there is nothing to be enforced. The Commission has no need or occasion to seek the aid of the court for enforcement so long as there is no threat of non-compliance, and that is equally true whether the respondent does or does not exercise its right to a judicial review of the order's validity. Injunctions are not issued for convenience merely because the parties are before the court.

We submit that in Section 11 of the Clayton Act Congress used the term "enforcement" in this ordinary sense.<sup>2</sup> The statute evidently was enacted upon the assumption that Federal Trade Commission orders would in the great majority of cases be respected and complied with; and that only when the respondent is violating or threatening to violate the order is the court to be called upon to enforce. As stated by the court of appeals in *Federal Trade*

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<sup>2</sup> In certain later statutes, reflecting the modern development of administrative law, the term has acquired a more technical significance. For example, in the National Labor Relations Act, "enforcement" refers merely to the issuance of an injunction by the court upon application of the Board, without any requirement other than a valid order. There the evident intention was to impose immediate sanctions on violation regardless of any showing of present need for enforcement.

*Comm. v. Standard Education Society*, 14 F. 2d 947, 948 (7th Cir.):

"It was the apparent intention of the Congress to give the practitioner of the alleged unfair methods an opportunity to mend its way before subjecting it to a decree of the court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed." (Italics the court's.)

So long as the respondent complies with the order it may go its way in peace; nor is it to be penalized for asserting in good faith its essential right to judicial review of the order's validity. Only when there is violation or threatened violation may the Commission sue for an injunction.

Where the Commission applies originally for an injunction the procedure provided and customarily followed is simple. The Commission files a petition in the court of appeals setting forth its order, alleging that the respondent has failed or neglected to comply, and praying that an injunction issue. A transcript of the record is certified and filed. The Court thereupon obtains jurisdiction of the proceeding (*Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105), and is empowered to enter a decree affirming, modifying or setting aside the order, and to enjoin violation subject to the limitations of the statute. The respondent may admit non-compliance and contest only the validity of the order, or it may concede validity and contest only the charge of violation, or it may contest both issues. Where both issues are contested the procedure in most of the circuits has been to consider first the validity of the order and then, where there is affirmance,

to refer the question of violation to the Commission as a master for hearing and report.<sup>3</sup>

This procedure was followed in the following cases:

*Federal Trade Comm. v. Standard Education Society*, 14 F. 2d 947 (7th Cir., 1926);

*Federal Trade Comm. v. Balme*, 23 F. 2d 615 (2nd Cir., 1928);

*Federal Trade Comm. v. Baltimore Paint & Color Works*, 41 F. 2d 474 (4th Cir., 1930);

*Federal Trade Comm. v. Herzog*, 150 F. 2d 450 (2nd Cir., 1945);

*Federal Trade Comm. v. Weiss*, 2nd Cir., 1945 (unreported);

*Federal Trade Comm. v. Standard Brands Inc.*, 189 F. 2d 510 (2nd Cir., 1951);

*Federal Trade Comm. v. Whitney & Co.*, 192 F. 2d 746 (9th Cir., 1951).

There are no cases to the contrary.

As recently as November 1951 the Court of Appeals for the Ninth Circuit, in a proceeding upon application for enforcement wherein the validity of the order was not challenged, nevertheless referred the case to the Commission for a hearing and findings on the issue of non-compliance. The court stated:

"The Commission is \* \* \* entitled to an affirmance of the order. However, on the issue raised by their answer—whether or not they have failed or neglected to obey the order—Whitney & Company and O'Brien

<sup>3</sup> In the Seventh Circuit the court first refers the case for determination of the question of violation, before proceeding to pass upon the merits of the order. *Federal Trade Comm. v. Standard Education Society*, 14 F. 2d 947.

are entitled to a hearing, with an opportunity to submit evidence." *F. T. C. v. Whitney & Co.*, 192 F. 2d 746.

In the *Standard Brands* case in the Second Circuit (189 F. 2d 510 (1951)) the Commission applied for enforcement of an order containing four clauses. Prior to filing its petition the Commission held hearings on the question of violation and submitted its findings to the court (a procedure not theretofore followed). The court decided to accept these findings "as if the Commission had been appointed our master". As to clause (1) of the order the Commission found no violation and did not request enforcement. As to clause (2) the court found that the evidence did not support the Commission's finding of violation and denied enforcement. It found that clause (3) had been violated for a short time but that the violation had ceased thereafter; the order having been violated, enforcement of this clause was granted in spite of the subsequent discontinuance.

There has been no "changing trend" in the decisions.

Of course, where non-compliance affirmatively appears, or is not denied, a hearing on the question of violation is unnecessary. "If, as here, it is fairly apparent that the order has not been obeyed, and the answer of the respondent fails to assert compliance, a decree of enforcement is justified." *Federal Trade Comm. v. Wallace*, 75 F. 2d 733 (8th Cir., 1935). To the same effect, *Federal Trade Comm. v. Morrissey*, 47 F. 2d 101 (7th Cir., 1931). Cases wherein injunctions have been granted on petition of the Commis-



sion, upon affirmance of the order, in the absence of a denial of the allegation of non-compliance, are numerous.<sup>4</sup>

Section 11 of the Clayton Act also provides for the essential right of judicial review. A party against whom a cease and desist order is issued may obtain review "by filing in the court a written petition praying that the order \* \* \* be set aside". Upon such a petition the court has "the same jurisdiction to affirm, set aside, or modify the order \* \* \* as in the case of an application by the Commission \* \* \* for the enforcement of its order".

When a petition for review is filed the Commission may, and frequently does, file a cross-petition for enforcement charging that the respondent has violated the order. If the charge of violation is denied, then both issues—validity and compliance—are presented exactly as in a case arising upon an original petition for enforcement. The jurisdiction of the court is the same in both cases, and its exercise is governed by the same statutory provisions. There is nothing whatever in Section 11 to the effect that different considerations are to be applied by the court in determining whether to grant an injunction upon a cross-petition than upon an original petition. The character of the application is the same in either case; and, like a counterclaim in a law suit, the same proof is required to sustain it as if it were the subject of a separate proceeding.

The question of affirmance and the question of enforcement are separate and distinct. The one depends upon the validity of the order, in whole or in part, when issued.

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<sup>4</sup> See, for example, *F.T.C. v. Good-Grape Co.*, 45 F. 2d 70 (6th Cir., 1930); *F.T.C. v. Army & Navy Trading Co.*, 88 F. 2d 776 (Ct. of Appeals, D. C., 1937); *F.T.C. v. Real Products Corp.*, 90 F. 2d 617 (2nd Cir., 1937); *F.T.C. v. Martoccio Co.*, 87 F. 2d 561 (8th Cir., 1937).

The other; under this statute, depends upon whether the person against whom the order was issued has failed or neglected to obey it. Exercise of the right to review presents only the issue of the order's validity, and the question of enforcement does not arise unless the Commission applies therefor. The distinct nature of the two remedies is apparent when it is considered that the jurisdiction to affirm, modify or set aside is appellate in nature, whereas enforcement is an exercise of the court's original equity power to enjoin.<sup>5</sup>

This Court has held that a petition for review of a cease and desist order of the Commission invokes only the appellate jurisdiction of the court of appeals. In *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 623-4; the Court said:

"It [the Commission] has not been delegated the authority of a court of equity. And a circuit court of appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The issuance of an injunction, however, obviously is an exercise of original jurisdiction. The constraint imposed by its decree is the constraint of the court, not of the Com-

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Refusing to distinguish between enforcement and review, the Commission has reached contradictory conclusions on this point. In the court below it asserted "the jurisdiction of the court is original and exclusive and not appellate, and is purely statutory" (R. 111). In its brief here it states "we submit, however, that the jurisdiction involved is clearly not original. It is rather a 'special statutory jurisdiction'" (Br.; p. 27).

mission; and the court alone may punish for contempt. Upon an application for enforcement, the Commission is in the position of a suitor for an injunction against violation of its order.

The distinction between review and affirmance, and the difference in the two judicial functions, was pointed out by the Court of Appeals for the Seventh Circuit in *Federal Trade Comm. v. Fairfoot Products Co.*, 94. F. 2d 844 (1938):

"Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41, et seq., the Circuit Court of Appeals possesses a two-fold function. At the request of one against whom the 'cease and desist' order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act."

"Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.' \* \* \*

"The necessary conclusion from the decisions of this circuit, and we believe from a proper construction of section 5, is that a general order of affirmance is not

equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.

"Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one proceeding the various questions which section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals."

The question whether evidence of failure or neglect to obey an order of the Commission is a statutory prerequisite to enforcement under Section 11 of the Clayton Act (or Section 5 of the Federal Trade Commission Act prior to 1938) appears never to have been directly presented to this Court. However, this Court has held that the right to judicial review of such an order is a substantial right, apart from the order's enforcement, and has indicated that enforcement may be had only in case of disobedience.

In *Federal Trade Comm. v. Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938), the Goodyear Company asserted that it had discontinued the price discriminations found and conceded that such discrimination was unlawful under the Robinson-Patman amendment, enacted after the order's issuance. This Court held that Goodyear nevertheless was entitled to an adjudication of whether the discriminations prohibited were in violation of the prior law, stating (pp. 259, 260):

"\* \* \* In case of failure to obey its order, the Commission may apply to the Circuit Court of Appeals for enforcement. And anyone required to cease and



desist from a violation charged may seek review in the Circuit Court of Appeals, praying that the order be set aside. \* \* \*

"The Commission, reciting its findings and the conclusion that respondent had violated the act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. \* \* \* As a continuing order, the Commission may take proceedings for its enforcement *if it is disobeyed*. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid." (Italics supplied.)

The *Goodyear* case is a complete answer to the Commission's contention that affirmance without enforcement presents only an abstract question and "would lead to the issuance of merely advisory opinions" (Br., p. 26).

The Commission places some reliance on the language of this Court's opinion in *Federal Trade Comm. v. Standard Education Society*, 302 U. S. 112, rehearing den. 302 U. S. 779. The question of enforcement had not there been presented, either in the court of appeals or by petition for certiorari. In considering the validity of the order this Court stated that certain clauses held invalid by the court below "should be sustained and enforced". By petition for rehearing the respondent pointed out that the issue of violation was pending in the court of appeals and that enforcement should not be directed until that issue was determined; but we think this Court's denial of rehearing may be regarded simply as a refusal to decide a question not properly before it.

The question whether enforcement should be granted upon affirmance on review without a showing of actual or

threatened non-compliance was squarely presented nearly thirty years ago in *L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923). A petition for review was there filed by the Silver Company. The court affirmed the order with modifications; and the Commission then moved for recall of the mandate and for entry of a decree enjoining violation of the order insofar as affirmed. The court stated:

"It does not necessarily follow that the court should take the same action upon a petition for a respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for that purpose. \* \* \*

"We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.

"\* \* \* In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company ~~so~~ continued that there would have been any basis for a proceeding by the Commission to enforce its order, \* \* \*. The situation, then, is that, as to the only substantial respect in

which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved, the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

It is, of course, true that on a cross-petition for enforcement, as well as on an original petition, an injunction will be granted if the charge of non-compliance is not denied and enforcement is not opposed. All but one of the cases cited in the first two paragraphs of footnote 12 in the Commission's brief (pp. 26-27) are of that character; and the same is true of all the cases relied on by Judge Clark.<sup>6</sup> These cases are not determinative of the question presented here, which is whether enforcement should be granted upon affirmance without a showing of non-compliance *where a factual issue as to compliance is presented*.

In a case where that question *was* presented (upon a petition for enforcement by the Commission) the Court denied an injunction, stating:

"If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that

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<sup>6</sup> Four cases are cited by Judge Clark, and also by the Commission, as instances of enforcement where no cross-petition was filed. In all four cases a formal cross-petition was in fact filed alleging non-compliance, and the charge was not denied.

petition has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory. If the allegation such as heretofore quoted from the petition be a necessary one, it follows that *such allegation, together with respondent's denial, presents an issue of fact necessarily determinable before this court can or should act upon the merits of the application.*

"Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. \* \* \*"  
*Federal Trade Comm. v. Standard Education Society*, 14 F. 2d 947, 948. (Italics supplied.)

We submit that exactly the same considerations apply where the application for enforcement is made in a proceeding initiated by a petition for review.

To be sure, where an order is affirmed on petition for review and the Commission asks an injunction, the person ordered to cease and desist may not resist enforcement without denying violation of the order, and thereby throw upon the Commission the burden of coming forward with affirmative proof of such violation. *Automatic Canteen Co. v. Federal Trade Comm.* (7th Cir., January 18, 1952); *Electro Thermal Co. v. Federal Trade Comm.*, 91 F. 2d 477 (9th Cir., 1937). Even an informal request for enforcement presumably is made pursuant to the statute and perhaps implies a charge of non-compliance sufficiently to require denial. Obviously no hearing is required where the factual issue is not raised. Here compliance was asserted, and the Commission offered no evidence of actual or threatened violation.



The statement that the "almost unvarying judicial practice has been to order enforcement upon affirmance", is contrary to the fact. That statement does not appear to be true even if cases where the issue of violation was not raised are included. In cases too numerous for citation (most of them arising under Section 5 of the Federal Trade Commission Act prior to 1938) the Commission's orders appear to have been affirmed upon petition for review without enforcement.<sup>7</sup>

The Commission cites two decisions of this Court in support of its claim that the courts have regularly enjoined violation of orders upheld on petition for review without a showing of non-compliance: *Federal Trade Comm. v. Cement Institute*, 333 U. S. 683; and *Federal Trade Comm. v. A. E. Staley Co.*, 324 U. S. 746. In each of these cases continuation of the unlawful practice pending review was admitted and well known to the Court. In the *Cement* case the principal charge was conspiracy in violation of the Federal Trade Commission Act, although there was a subsidiary charge of Clayton Act violation. Under the former Act (as amended) the court had no discretion as

<sup>7</sup> E.g., see *Aluminum Co. of Amer. v. F.T.C.*, 284 Fed. 401 (3rd Cir., 1922); *Hills Bros. v. F.T.C.*, 9 F. 2d 481 (9th Cir., 1926); *Cream of Wheat Co. v. F.T.C.*, 14 F. 2d 40 (8th Cir., 1926); *International Shoe Co. v. F.T.C.*, 29 F. 2d 518 (1st Cir., 1928); *Fluegelman & Co. v. F.T.C.*, 37 F. 2d 59 (2nd Cir., 1930); *Shakespeare Co. v. F.T.C.*, 50 F. 2d 758 (6th Cir., 1931); *Marietta Mfg. Co. v. F.T.C.*, 50 F. 2d 641 (7th Cir., 1931); *Consolidated Book Publishers, Inc. v. F.T.C.*, 53 F. 2d 942 (7th Cir., 1931); *Butterick Publishing Co. v. F.T.C.*, 85 F. 2d 522 (2nd Cir., 1936); *Chicago Silk Co. v. F.T.C.*, 90 F. 2d 689 (7th Cir., 1937). In a number of these cases the Commission requested at the close of its brief that a decree of enforcement be issued. It is possible that in some of such cases an injunctive decree was submitted by the Commission and entered without opposition. If so, this does not appear from the official reports. Many other similar cases might be cited.

to enforcement. Furthermore, the continued use of the multiple basing point system by the cement companies until the case reached this Court was common knowledge. In the *Staley* case, the Commission filed a cross-petition for enforcement in the court of appeals, alleging that Staley had failed and neglected to obey the order, and this charge was not denied. It thus appears that in each of these cases this Court directed enforcement upon evidence of actual violation of the order upheld.

In one case (not cited by the Commission) enforcement was granted after affirmance upon petition for review, in spite of an assertion that the order had been complied with. *National Silver Co. v. Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937). The court held that since the petitioner was insisting that it had the right to continue the "misleading designation" of its merchandise, it was the duty of the Court to "affirm and enforce" the order. That case merely emphasizes the discretion vested in the court of appeals, upon an application for enforcement, to determine whether there is a sufficient present threat of violation to justify an injunction.<sup>8</sup>

There is no question here of this proceeding being moot. The order, and the decree affirming it, remain in full force and effect, and enforcement, if the occasion arises, will have been expedited by the prior adjudication of its validity. The significance of petitioner's claim of prior abandonment is only to confirm its assertion that it has complied with the order and is not threatening violation.

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<sup>8</sup> Apparently to the same effect, see *Corn Products Refining Co. v. F.T.C.*, 144 F. 2d 211, 220, where compliance with one clause of the order was asserted and there is a dictum that proof of "mere discontinuance" would not justify a refusal to enforce.

If a factual issue had been presented, both parties would have been entitled to a hearing to provide the necessary factual basis for action by the court upon the request for an injunction. Here, the Commission did not ask a hearing, and takes the position that compliance is immaterial.

The courts have properly distinguished between discontinuance of the prohibited practice prior to, and after, the issuance of the order. In the following cases arising upon petition for review the petitioner asserted that all or a part of the practices found unlawful had been abandoned prior to the issuance of the order. The court affirmed, but did not enforce:

*Sears, Roebuck & Co. v. Federal Trade Comm.*,  
258 Fed. 307 (7th Cir., 1919);

*Guarantee Veterinary Co. v. Federal Trade  
Comm.*, 285 Fed. 853 (2nd Cir., 1922);

*Fox Film Corp. v. Federal Trade Comm.*, 296  
Fed. 353 (2nd Cir., 1924);

*Chamber of Commerce of Minneapolis v. Federal  
Trade Comm.*, 13 F. 2d 673 (8th Cir., 1926);

*Arkansas Wholesale Grocers Association v. Fed-  
eral Trade Comm.*, 18 F. 2d 866 (8th Cir.,  
1927);

*Armand Co. v. Federal Trade Comm.*, 78 F. 2d  
707 (2nd Cir., 1935);

*Fairyfoot Products Co. v. Federal Trade Comm.*,  
80 F. 2d 684 (7th Cir., 1935).

In *Chamber of Commerce of Minneapolis v. Federal Trade Comm.*, *supra*, the Chamber contended that there was no basis for a cease and desist order as to certain practices which it claimed it had ceased long prior thereto. The Court said (pp. 686-7):

"However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time."

In two cases it has been held that abandonment of the unlawful practice some time after the issuance of the order, but prior to the application for enforcement, is no ground for denying an injunction. *Federal Trade Comm. v. Wallace*, 75 F. 2d 733 (8th Cir., 1935); *Federal Trade Comm. v. Standard Brands Inc.*, 189 F. 2d 510 (2nd Cir., 1951).

At page 16 of the Commission's brief we find the surprising statement that the statutory provision "if such person fails or neglects to obey such order" is a "directive to the Commission as to the circumstances under which it may go into court to seek enforcement", but that "it cannot properly be read as imposing a condition which a court must find to be satisfied before it can grant enforcement". The position seems to be that while non-compliance is a condition precedent to an application for enforcement, the Court may act upon the application without concerning itself as to whether the condition has been satisfied. No case is cited in support of such a construction.

Similar conditions making the right of an administrative agency to apply for an injunction or issue an order dependent on a showing of present or immediately threatened violation have been contained in other acts and have been construed strictly where the wording of the statute is clear.

*Securities and Exchange Comm. v. Torr*, 87 F. 2d 446 (2nd Cir., 1937) was an appeal by the S. E. C. from an order granting a preliminary injunction against violation of



the Securities and Securities Exchange Acts. Section 21(e) of the latter act (15 U. S. C. 78u(e)) provided that "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of this chapter, \* \* \* it may \* \* \* bring an action \* \* \* to enjoin such acts or practices, \* \* \*". The court held that under this section proof of present or threatened violation was necessary to support an injunction, and that evidence of past violation was not sufficient, stating (p. 450):

"As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear. *S. E. C. v. Jones*, 85 F. 2d 17. But, when such statutory prerequisites are alone relied on, the unambiguous language of the statute is to be given its effect. *Cutten v. Wallace*, 80 F. 2d 140. That language in this instance conditions the right upon sufficient proof that 'any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation' of the statute.

"As the appellants were not engaging in any such acts or practices and the circumstances fail to support any reasonable inference that they were about to engage in any at the time the suit was brought or at the time the injunction was made effective, we are constrained to hold that it was improvidently granted."

In *Cutten v. Wallace*, 80 F. 2d 140 (7th Cir., 1935) a similar question arose under the Grain Futures Act of 1922. That Act provided that "If the Secretary of Agriculture has reason to believe that any person is violating

any of the provisions of this Act", he may serve a complaint stating his charges, and "upon evidence received" the Commission created by the Act may require all contract markets to refuse such person trading privileges. The Commission argued that although the statute used the present tense it should be so construed as to include past transactions; that without such a construction the power to deal with an offender was practically nil. The court cited the rule that "Where there is no ambiguity in words of statute there is no room for statutory construction", and stated (pp. 142-3):

"We are, however, required to construe the statute,—not to pass upon its purposes, but upon its wording. \* \* \* We are not \* \* \* persuaded that the words of the statute here used can or should be so stretched as to include past violations which were committed and completed two years before the complaint was filed."

This Court unanimously affirmed. *Wallace v. Cutten*, 298 U. S. 229.

This case created no conflict, and is in accord, with the prior decisions of the courts of appeals on the question here presented. We doubt that this Court would have granted certiorari had it not been for the appearance of conflict created by the opinion of the Court of Appeals for the Seventh Circuit in *Automatic Canteen Co. v. Federal Trade Comm.*, delivered January 18, 1952 while this Court was considering the petitions in this case. The *Automatic Canteen* case was initiated by petition for review and the Commission filed a cross-petition for enforcement. Without asserting compliance the Canteen Company argued that it was incumbent on the Commission to show that viola-

tion of the order had occurred or was imminent, citing the decision of the Second Circuit in the present case. The court granted enforcement, stating:

"We regret that we cannot agree with the reasoning and conclusion of that eminent court in denying enforcement. We are in accord with the conclusion of Judge Clark, dissenting, and the reasons stated by him, that the court of appeals does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission. \* \* \*"

The decision reached was obviously correct. The court need only have pointed out that in the absence of any denial that the order has been violated the court is justified in assuming that the unlawful practice has continued. The decision in the present case evidently was misconstrued and the criticism of it was gratuitous. If read as meaning that it is the duty of the court, upon affirmance, to issue an injunction on cross-petition of the Commission without a finding of actual or threatened non-compliance, then the *Automatic Canteen* case, not this case, is in conflict with the prior decisions.

**B. A Different Rule for Enforcement Upon a Cross-Application Than Upon an Original Application Would Lead to Unjust and Unreasonable Results, and Would Not Aid the Commission.**

The Commission urges that even if evidence of non-compliance is a statutory prerequisite to the granting of an injunction upon original application of the Commission, different considerations should apply when the respondent petitions for review. Such a rule would penalize the respondent for exercising his judicial right of review and

would lead to unjust and unreasonable results. It would mean that a respondent desiring in good faith to comply with the law, would be placed in the dilemma of having to choose between complying with an order of doubtful validity or testing it at the risk of having to do business thereafter under a court injunction; and the risk would be a certainty where, as here, only modification is sought.

The filing of a petition for review creates no additional reason or necessity for making enforcement mandatory. Affirmance establishes that violation of the order is a violation of the law and the effectiveness of the order is thereby increased; and the need for an injunction is correspondingly lessened. Continuation of the forbidden practice after a decree of affirmance is an invitation to triple damage suits which few business concerns care to risk.

When an order clearly valid is issued by the Commission the respondent need only comply with it, and so long as he complies an injunction will not issue against him. But suppose the order contains two clauses, one valid and the other of doubtful validity. The respondent complies with the first clause and does not challenge it, but petitions the court to review and set aside the second clause. Suppose, further, that the court finds the second clause invalid and strikes it from the order. Under the rule here proposed it would be the duty of the court, upon affirming the first clause, to enjoin its violation, even though the respondent did not question its validity, had fully complied, and had been forced to assume the burden and expense of coming to the court to have the invalid clause set aside.

Similarly, if the respondent named in the supposed order, while complying with the first clause, had chosen simply to ignore and violate the second clause, and the



Commission had then obtained evidence of the violation and petitioned for enforcement, the respondent could still have challenged the second clause and have had it set aside, but, in the absence of a charge and showing of non-compliance with the first clause an injunction against violation of that clause would not issue. (*Federal Trade Comm. v. Standard Brands Inc.*, 189 F.<sup>2d</sup> 510.)

Such results could not have been intended when Congress enacted Section 11 of the Clayton Act. Most business men desire to comply with the law and to know the conditions under which they can lawfully operate their businesses. The result of the rule here sought would be to place a premium on violation rather than review, and would add to the enforcement burden of both the Commission and the courts.

The Commission asserts that to make evidence of non-compliance a prerequisite for enforcement where the order is affirmed upon petition to review "would leave a party who had unsuccessfully challenged a Commission order on the merits free to continue to flout the judicially approved order". There are two answers to this. In the first place, in the cases (including the present case) where an injunction has been denied after affirmance upon review, the denial has been on the ground that the forbidden practice was discontinued before the issuance of the order and there were no facts indicating a threat of renewal. In such cases where the court finds no need for an injunction, there is no reason to assume that the court was wrong or that there will be any further necessity for enforcement. Judge Clark's dissent, and the Commission's entire argument here, seem to be based on the assumption that any person who ventures to challenge an order of the Commission must be presumed to be planning to violate it.

Secondly, denial of an injunction for lack of a showing of non-compliance when the issue is raised in a proceeding upon petition for review creates no different situation than exists when the Commission fails to establish violation after affirmance in a proceeding upon its original petition for enforcement. A construction making enforcement upon affirmance mandatory only in a proceeding initiated by petition for review would be of little benefit to the Commission. The attack here is upon the wisdom of the statute and should be made to Congress, not to this Court.

There is no basis for the Commission's repeated assertion that to require a showing of actual or threatened non-compliance in support of an application for enforcement in a review proceeding (where the issue is raised) will result in delaying and impeding enforcement. Quite the contrary is true. Review and affirmance does not delay and may facilitate enforcement.

In the present case, for example, nearly a year elapsed between the filing of a petition for review and the presentation of the case to the court. During that interval the Commission had ample opportunity to ascertain whether respondent was complying with the order. If it had obtained evidence of non-compliance the court undoubtedly would have received it, and the delays incident to the filing of an original petition would have been obviated. Without such evidence the Commission could not have applied for enforcement anyway.

Furthermore, where the Commission applies initially for enforcement, the court must determine two questions (1) the validity of the order, and (2) whether there has been non-compliance. In the present case, if the Commis-

sion should hereafter apply for enforcement, non-compliance will be the only issue, the validity of the order having already been passed upon. If the Commission is concerned about speedy enforcement of its orders it should be glad to have the question of affirmance decided and out of the way before occasion for enforcement arises.

There is a further and more important consideration. Section 11 of the Clayton Act places no limitation on the time for enforcement or review. When the Commission issues an order of doubtful validity or scope, the respondent has the choice of petitioning for review or adopting his own interpretation of the order until such time as the Commission applies for enforcement. Most respondents prefer to petition for review so as to obtain as promptly as possible an adjudication of what changes in their business practices are necessary for compliance. But if it should now be held that if the order is affirmed upon review an injunction will issue as a matter of course, the respondent would be better advised to ignore the order until the Commission can catch up with him and obtain evidence of violation. If the Commission applies for enforcement the respondent can then raise every question as to the validity of the order that could have been raised on petition for review, and he will in addition have the benefit of a judicial decision as to whether the specific practice charged constitutes a violation—a valuable right, and without any penalty if the charge of violation is upheld. The short cut now proposed would simply discourage respondents from seeking review and divert traffic from one channel to the other.

The Commission's principal and primary complaint in the past has been that it is required to allege and prove

non-compliance with its cease and desist orders before it can obtain an injunction upon its own application. It is now seeking to obtain a half loaf where only a whole loaf will suffice. For reasons above stated, the construction urged, if applied only in proceedings on petition for review, would make the enforcement procedure illogical and lopsided and probably would add to the enforcement burden of the Commission.

**C. The Granting of an Injunction Where Non-Compliance Is Not Shown Is Discretionary. That Discretion Was Not Here Abused.**

Section 11 of the Clayton Act contains no mandate to the court of appeals to issue an injunction in any case. The provision is that "if such person fails or neglects to obey such order" the Commission may *apply to the court* for enforcement of the order, and the court thereupon obtains *jurisdiction of the proceeding*. There is no other provision as to enforcement. It was evidently contemplated that the court should proceed in the exercise of its original equity jurisdiction in acting upon the application for an injunction.

As stated in *Federal Trade Comm. v. Fairfoot Products Co.*, 94 F. 2d 844, 846 (7th Cir., 1938), with reference to old Section 5 of the Federal Trade Commission Act:

"The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein."



This Court has held that much more positive statutory provisions do not divest the court of its discretion in deciding whether to enjoin violation of a statute or regulation. *Hecht Co. v. Bowles*, 321 U. S. 321. That was a suit by the price administrator for an injunction under the Emergency Price Control Act of 1942. The Act provided that "upon a showing by the administrator that such person has engaged or is about to engage in such acts or practices a permanent or temporary injunction, restraining order or other order shall be granted without bond". This Court said (p. 329):

"A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. \* \* \* The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied".

Of course, where a violation of the order is shown or is not denied the courts have regularly granted a decree of enforcement upon affirmance (cases cited under sub-heading "A" of this Point). Issuance of an injunction upon such a showing or admission may be regarded as mandatory except in most unusual circumstances; at least a refusal to enforce in such a case would be an abuse of discretion. But when the person ordered to cease and desist asserts that he has complied with the order and shows that the practice forbidden was discontinued prior to its issu-

ance, the courts have denied an injunction when the Commission makes no showing that violation has in fact occurred or is threatened; and in the cases where a factual issue has been joined the practice has been to refer that issue for hearing and findings prior to decision.

Where the question has arisen on petition for review the courts of appeals have treated the application for enforcement as invoking the court's broad equity powers, to be exercised "upon the lines adopted by courts of equity generally in hearing suits for injunction".

*L. B. Silver Co. v. Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923);

*Fairyfoot Products Co. v. Federal Trade Comm.*, 80 F. 2d 684 (7th Cir., 1935); affirmance held not equivalent to enforcement, *Federal Trade Comm. v. Fairyfoot Products Co.*, 94 F. 2d 844; *Butterick Co. v. Federal Trade Comm.*, 4 F. 2d 910 (2nd Cir., 1925).

Enforcement of the Clayton Act is not entrusted solely to the Federal Trade Commission. Section 15 of that Act vests the district courts with jurisdiction to prevent and restrain violations in proceedings in equity instituted under the direction of the Attorney General. The issuance of an injunction in such cases clearly is discretionary. On the other hand, the issuance of a cease and desist order by the Federal Trade Commission upon a finding of past violation is not discretionary. The remoteness of the violation or its prior abandonment are not material considerations in a hearing upon Commission complaint. This is because Section 11 provides that if upon such hearing the Commission is of the opinion that there has been a violation it shall

issue a cease and desist order. It may not be assumed, therefore, that in every case in which a cease and desist order is issued by the Commission an injunction would have been granted by the district court if suit had been brought there.

~~Here~~ petitioner has had no opportunity to be heard on the question whether there is presently any sufficient threat of violation of this order to justify the exercise of the equity jurisdiction of the court. It is able to point to the testimony of its sales manager in 1946 only because he was called as a witness by the Commission and questioned to some extent about the company's current pricing practices. Whether such testimony clearly shows a termination of the 1941 discriminations prior to 1946 is not decisive of the question now presented, although we think the testimony does show that those discriminations had been abandoned.<sup>9</sup>

The important point is that the Commission has no equity powers (*Federal Trade Comm. v. Eastman Kodak Co.*, 274 U. S. 619, 623) and therefore the issuance of a cease and desist order implies no finding of a threat of future violation sufficient to justify the issuance of an injunction by a court of equity. Particularly is this true where the application for an injunction reaches the Court ten years after the commission of the acts found unlawful and five years after the hearings on which the order is based.

We submit, therefore, that where, as here, compliance with the order is asserted and there is no charge of non-compliance, an injunction may not properly be granted

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<sup>9</sup> Mr. O'Leary testified that Ruberoid was then selling to only five customers, that they all got the same discounts regardless of quantity, and that "they get this discount whether they are wholesalers or applicators" (R. 20).

without affording the person against whom it is sought an opportunity to be heard on the question whether *the facts existing at the time the application is made* justify injunctive relief. Here the Court found "uncontradicted evidence" of prior abandonment in the record, and the Commission, while questioning that finding, offered no showing that the discriminations had thereafter been continued or resumed.

"A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. \* \* \* The remedy is never afforded on suspicion or on the ungrounded fear that the offense may be repeated in the future." (*Walling, Administrator v. Buettner & Co.*, 133 F. 2d 306, 308 (7th Cir., 1943).)

"Even when the plaintiff is the United States or one of its administrative agencies, and the suit is therefore brought in the public interest, or at least in the interest of a class, there must be some tangible probability that the wrong will be repeated to justify an injunction". (*Ring v. Authors' League of America*, 186 F. 2d 637, 642 (2nd Cir., 1950).)

Even Judge Clark, in his dissent below, admitted that the court had a choice in the matter of granting an injunction. Having obtained a favorable opinion, even though a dissent, the Commission has deemed it opportune to present the question to this Court in a case otherwise woefully weak both as to the merits of the order and as to the need for enforcement. If it be accepted that the court below had discretion to refuse enforcement, then certainly that discretion was not abused.



### ***Conclusion.***

The case should be remanded to the court of appeals with direction to modify the order to cease and desist in the respects requested in Points I and II of this brief. The Commission's prayer for enforcement should be denied without prejudice.

Respectfully submitted,

APPELL, AUSTIN & GAY,  
*Attorneys for The Ruberoid Co.*

CYRUS AUSTIN,  
*Of Counsel.*

March, 1952.

## Appendix 1.

Sections 2(a) and 2(b) of the Clayton Act, as Amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A., sec. 13).

Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods of quantities in which such commodities are to such purchasers sold or delivered: \* \* \*

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima facie* case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That

## Appendix 1

nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act (Act of October 15, 1914, 38 Stat. 734; 15 U. S. C. A., sec. 21).

\* \* \* \* \*

Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right [735] to appear at the place and time so fixed and show cause why an order should not be entered by the commission, authority, or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission, authority, or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission, authority, or board. If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been

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or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, \* \* \*

If such person fails or neglects to obey such order of the commission, authority, or board while the same is in effect, the commission, authority, or board may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board. Upon such filing of the application and transcript the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, authority, or board. The findings of the commission, authority, or board as to the facts, is supported by testimony, shall be conclusive. \* \* \* The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission, authority, or board to cease and desist from a violation



*Appendix 1*

charged may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forth [736] with shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the Court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission, authority, or board as in the case of an application by the commission, authority, or board for the enforcement of its order, and the findings of the commission, authority, or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission, authority, or board shall be exclusive.

## Appendix 2.

Following are the pertinent provisions of cease and desist orders issued by the Federal Trade Commission against respondents charged with discriminating in price between competing purchasers in violation of Section 2(a) of the Clayton Act, from 1944 to June, 1950.

Provisions limiting the prohibitions of the order to differentials found to have or which may have a substantial adverse effect on competition are printed in bold face type. Provisions excepting or exempting differentials making only due allowance for differences in seller's costs are printed in italics.

*Matter of National Biscuit Company*, 38 F. T. C. 213, 222  
(Feb., 1944)

"IT IS ORDERED that the respondent \* \* \* do forthwith cease and desist:

"1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom **in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.**

"2. From continuing or resuming the discriminations in price **referred to and described in paragraph four of the aforesaid findings as to the facts.**

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, **in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discriminations sub-**

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**stantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended."**

*Matter of American Art Clay Co., 38 F. T. C. 463, 468 (May, 1944)*

**"IT IS ORDERED, That the respondent \* \* \* do forthwith cease and desist:**

**"1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and granting discounts therefrom in the manner and under the circumstances found in paragraph 5 of the aforesaid findings as to the facts and conclusions.**

**"2. From continuing or resuming the discrimination in price referred to and described in paragraph 5 of the Commission's findings as to the facts herein.**

**"3. From otherwise discriminating in price between purchasers of crayons [etc.] in a manner and degree substantially similar to the manner and degree of the discrimination referred to in paragraph 5 of the Commission's findings as to the facts herein; and in any other manner resulting in price discriminations substantially equal in amount to such discriminations except as permitted by Section 2 of the Clayton Act, as amended."**

*Matter of Morton Salt Co., 40 F. T. C. 388, 398 (April, 1945)*

**"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality as among wholesale or retail dealers purchasing said salt**

## Appendix 2

*when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered,*

“(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; **provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.**

“(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; **provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.”**

*Matter of Booth Fisheries Corporation, 40 F. T. C. 690, 695 (June, 1945)*

“IT IS ORDERED that the respondent \* \* \* do forthwith cease and desist from discriminating; directly or indirectly in the price of such fish products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such fish products are sold or delivered* \* \* \*.”

“1. By selling such fish products to some customers at prices different from the prices charged other customers who in fact compete in the sale and dis-



## Appendix 2

tribution of such fish products when the effect of such differences in price may be substantially to lessen competition or to injure, destroy, or prevent competition among such customers."

*Matter of John B. Stetson Company*, 41 F. T. C. 244, 254  
(Oct., 1945)

"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist:

"(1) From selling such products of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in Paragraph Five of the aforesaid findings as to the facts.

"(2) From continuing or resuming the discriminations in price referred to and described in Paragraph Five of the aforesaid findings as to the facts.

"(3) From otherwise discriminating in price between purchasers of men's hats of like grade and quality in any manner or degree substantially similar to the manner and degree of the discriminations referred to in Paragraphs Four, Five and Six of the aforesaid findings as to the facts, or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended."

*Matter of Ferro Enamel Corporation, et al.*, 42 F. T. C.  
36, 55 (Feb., 1946)

"III. IT IS FURTHER ORDERED that the corporate respondents \* \* \* do forthwith cease and desist from:

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"1. Directly or indirectly discriminating in price between different purchasers of 'frit' of like grade and quality in the manner and degree set forth in the volume discount schedule shown in Paragraph Five of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price.

"2. Directly or indirectly discriminating in price in any other manner between purchasers of 'frit' of like grade and quality, when such discriminations substantially equal or exceed any of the discriminations shown in the volume discount schedule set forth in Paragraph Five of the findings as to the facts herein.

"3. Otherwise discriminating in price between purchasers of 'frit' of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination; provided, that this shall not prevent price differences which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which said 'frit' is to such purchasers sold or delivered, and provided further, that this shall not prevent respondents from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor."

*Matter of The Curtiss Candy Company*, 44 F. T. C. 237, 275 (Nov., 1947)

"II. IT IS FURTHER ORDERED that the respondent . . . do forthwith cease and desist from discriminating, directly

## Appendix 2

or indirectly, in the price of such products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:*

"1. By selling such products to some vending-machine operators at prices different from the prices charged other vending-machine operators who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such vending-machine operators or between respondent and its competitors.**

"2. By selling such products to some wholesalers or jobbers thereof at prices different from the prices charged other wholesalers or jobbers who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such wholesalers or jobbers or between respondent and its competitors.**

"3. By selling such products to some retailers thereof at prices different from prices charged other retailers who in fact compete in the sale and distribution of such products, **provided, however, that this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such retailers or between respondent and its competitors."**

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*Matter of Standard Oil Company*, 43 F. T. C. 56 (August, 1946)

"IT IS ORDERED that the respondent \* \* \* do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers: "

"1. By selling such gasoline to competing purchasers at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

"3. By otherwise discriminating in price between purchasers of such gasoline in a manner and degree substantially similar to the manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.

"4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

"5. By allowing a price to any dealer, jobber or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity.

"The above specified requirements of this order are subject, however, to the following provisos:

"(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by re-



## Appendix 2

respondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

"(b) That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered."

Matter of Minneapolis-Honeywell Regulator Company, 44 F. T. C. 351, 389 (Jan., 1948)

"III. IT IS FURTHER ORDERED that respondent \* \* \* do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil burner manufacturers purchasing said automatic temperature controls and other furnace controls—

"1. By selling such controls to some oil-burner manufacturers at prices **materially different** from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, *when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered.*"

Matter of Walter H. Johnson Candy Company, 44 F. T. C. 1021 (June, 1948)

"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist from discriminating, directly or indirectly,

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in the price of such products of like grade and quality as among purchasers *when the differences in price are not justified by differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which said products are sold or delivered:*

"1. By selling such products so some vending machine operators at prices differing from the prices charged other vending machine operators who in fact compete in the sale and distribution of such products in the same trade areas."

*Matter of Jacques Kreisler Manufacturing Corporation,*  
F. T. C. Docket No. 5446 (Aug., 1948)

"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist from:

"Directly or indirectly discriminating in price by charging, accepting, or receiving from different purchasers of jewelry products of like grade and quality **net prices which differ as much as, or more than, 2½ percent of the highest of such net prices;** provided, however, that the foregoing shall not be construed to prevent respondents from defending any alleged violation of this order by showing that different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered."

*Matter of F. & V. Manufacturing Company, Inc.,* 60 F. T. C.  
Docket No. 5579 (March, 1950)

"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist from:

"Directly or indirectly discriminating in the price of jewelry products by charging, accepting, or re-

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ceiving from different purchasers of such products of like grade and quality **net prices which differ as much as, or more than, 10 percent of the highest of such net prices**; *Provided, however, that the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered.*"

*Matter of United States Rubber Company, 69 F. T. C. (June, 1950)*

"IT IS ORDERED that respondent \* \* \* do forthwith cease and desist from directly or indirectly discriminating in the price of waterproof or canvas footwear by charging or receiving from different purchasers of such products of like grade and quality **net prices which differ as much as, or more than, 2 percent of the highest of such net prices**; *Provided, however, that the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that the different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered.*"

**PETITION  
FOR  
WRIT  
of  
CERTIO-  
RARI**



LIBRARY  
SUPREME COURT, U.S.

FILED

DEC 28 1951

CHARLES ELMORE CROFT  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1951

No. 448 **504**

THE RUBEROID CO.,

*Petitioner,*

*against*

FEDERAL TRADE COMMISSION,

*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

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AUSTIN & MALKAN,  
*Attorneys for Petitioner,*  
500 Fifth Avenue,  
New York 18, N. Y.

CYRUS AUSTIN,  
*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

October Term, 1951

No. 448

THE RUBEROID CO.,  
*Petitioner,*  
*against*  
FEDERAL TRADE COMMISSION,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, The Ruberoid Co., prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the final decree of that court filed September 5, 1951 in a cause bearing the above caption, affirming a cease and desist order of the Federal Trade Commission issued January 20, 1950. This petition is directed to the merits of the order affirmed, and is in the nature of a cross petition to the petition for certiorari filed by the Solicitor General on November 26, 1951, asking review only of the omission from the decree below of an enforcement provision enjoining violation of the Commission's said order. Petitioner accepts and relies on the certified transcript of the record in this cause heretofore filed in this Court by the Solicitor General.

## The Matter Involved: Background and Scope of This Petition.

The Commission's order was issued in a proceeding upon complaint, issued in 1943, charging petitioner with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (R. 2). The charge was that petitioner had granted certain trade discounts to some purchasers of its roofing materials, not allowed to other competing purchasers. Hearings were not held until after the War in 1946. The Commission introduced testimony and invoices showing that during the year 1941, in New Orleans, La., petitioner had allowed a discount of 5%, and in some cases 7½%, to four customers functioning as applicators (roofing contractors) or as retailers, which discounts were not allowed certain competing applicators and retailers. There is no evidence of discrimination at any other time or place. It appeared that the allowance of these 1941 discounts resulted from competitive conditions local to New Orleans, that petitioner's pricing policy there was not indicative of its pricing elsewhere, and that prior to 1946 the discriminations proved had been eliminated either by adoption of a one-price policy or by observance of functional competitive levels (R. 31-36).

Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. The defense of meeting competition was pleaded, but was not pressed, since the Commission had held in the Standard Oil case in 1945, a few months before these hearings, that that defense was not available in this type of case (41 F. T. C. 263). Proposed findings and conclusions were agreed upon, except as to one point, between the opposing attorneys, and were submitted to and adopted by the trial examiner (R. 101-109). The sole point of dis-



pute was whether the evidence established discrimination in price between wholesalers, and on this point the Commission upheld petitioner (R. 140, fol. 420). After briefs and argument (turning principally on the scope of the order to be issued) the Commission issued its findings and a cease and desist order which prohibits petitioner from discriminating in price in the sale of its roofing materials

“By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products.”

This order is plainly invalid on its face. It explicitly prohibits any differential, however small, in the prices charged purchasers competitively engaged in the resale of roofing materials at any level of competition, without exception or proviso. It is not indefinite or ambiguous and does not require construction. It applies to petitioner's entire nation-wide business. There is no exemption of differentials which make only due allowance for differences in petitioner's costs, or of differentials resulting from a lower price made in good faith to meet competition. Such differentials are permitted by the Act but forbidden by this order. Furthermore, the Commission made no finding as to what differentials might substantially affect competition between wholesalers or manufacturers in the resale or distribution of petitioner's products; yet this order prohibits any differential whatever between competing wholesalers or between competing manufacturers. An order which expressly prohibits what the Act expressly permits cannot be valid and should not stand.

Petitioner duly petitioned the Court of Appeals for review and modification, asking that the differentials prohibited be limited to those found by the Commission to be

unlawful, and to those which are unlawful under the Act. Petitioner did not contest the Commission's findings of fact. It took the position there, and asserts here, that the order is invalid as a matter of law, in that it prohibits future differentials which were not found unlawful and which would at most be *prima facie* unlawful under the statute, without exception or proviso affording petitioner an opportunity to justify or defend them if charged with violation.

This is not a case where the order prohibits other *unlawful* acts reasonably related to those found unlawful, or practices lawful in themselves found to have been used for an unlawful purpose. It is not and cannot be contended that the Commission is justified, as a matter of remedy, in prohibiting *all* differentials in order to reach those which the statute declares unlawful.

The Commission conceded that it never before had issued an order like this one, or at least that no similar order issued under the Clayton Act has previously reached the courts. During its fifteen years' administration of the Robinson-Patman Act the Commission's orders under Section 2(a) have consistently included an exception or proviso permitting differentials justified by cost differences, and many orders have contained a proviso exempting differentials made in good faith to meet competition. No court has ever stricken or frowned upon such an exception or proviso. The Commission stated in its brief below that this case "represents another milestone in the Commission's effort to establish a fair and just interpretation of the Robinson-Patman Act."

The principal contention made below in support of this order was that since petitioner had not offered evidence at the hearing to establish cost justification or the good faith

meeting of competition it was foreclosed from raising those issues in any proceeding for enforcement of the order. This wholly ignores the fact that a cease and desist order looks to the future, and that the prohibitions of this order extend far beyond the differentials which were litigated and found unlawful in New Orleans. The violations charged were differentials of 5% and 7½% in the prices charged New Orleans applicators and retailers. Petitioner could not have defended this charge by showing that a differential of 2% between certain of its customers, even in New Orleans, would have been justified by cost differences; yet future differentials in that amount or any amount are prohibited. Petitioner could not have defended by showing that a carload or other quantity discount on shipments from its New Jersey or New England factories was so justified, or that a lower price made to one of several competing customers in Chicago was made in good faith to meet competition. This order, nevertheless, extends to all such situations.

The Commission was, however, forced to concede that upon the basis of changed facts or circumstances petitioner should have the right to assert the defenses which the Act permits. It argued that if in the future petitioner should claim that certain prohibited differentials are lawful it might then resort to the Commission or to the court for relief from the order. It assured the court that it would not institute enforcement proceedings without first giving petitioner an opportunity to demonstrate to the Commission that its prices were justified by cost differences or by competition. Apart from the illusive character of such assurances, the fault with this order is that it prohibits differentials which were lawful when the order was issued and are lawful now. It is no answer to say that correction of present invalidity should be postponed to the future. Peti-

tioner is entitled to know now what this order prohibits so that it can comply with the order according to its terms.

The Court of Appeals seemingly accepted the Commission's assurances that it was not its intention to seek enforcement of this order beyond the boundaries of the statute. The court refused modification, but stated in its opinion that if there were any doubt as to the permissible scope of enforcement petitioner might rely upon the opinion itself. The opinion states (R. 155):

"Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discriminations and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled."

And upon rehearing the court said further (R. 176):

"Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to introduce in its defense evidence that the conduct com-



plained of was permitted by exceptions contained in the Clayton Act itself, as amended. This, as we understood its position, was substantially all petitioner desired."

It is apparent from the above quotations that the Court of Appeals has no intention of enforcing this order according to its terms. As we read these pronouncements they mean that (except as to differentials of the same character as those previously found unlawful) petitioner may violate the order with impunity so long as it complies with the law. This conception of an injunction does violence to established principles of equity jurisprudence. It is fundamental that in a proceeding for violation of an injunction the issue of violation is determined upon the terms of the injunction, not by reference to the law under which the injunction was issued. A valid injunction must be sufficiently definite and specific so that the person enjoined may look only to the injunction to ascertain what is necessary for compliance. This cease and desist order is definite and specific; yet the court below has given notice that it will not be treated as meaning what it says if an attempt is made to enforce it. The court says that it is unnecessary to write the statutory provisos into the order, but that, if called upon to enforce, it will read the provisos in anyway "to the extent that they are legally applicable."

The opinion below leaves the question of compliance with the order in a jumble of confusion and doubt. Petitioner must now guess to what extent the statutory provisos will be deemed "legally applicable" if it is charged with violation of the order's express terms. It must guess what differentials the Commission and a differently constituted court will find to be "legally permissible" under the statute. It must guess whether pricing and competitive situations existing today present a sufficiently "definite

change of circumstances" to warrant "a new hearing on the facts".

The Court of Appeals did not include in its decree a provision enjoining violation of the terms of this order. Exercising its discretion as a court of equity—a discretion which has never been questioned by this Court or by any court of appeals—the court found no present need for an injunction and limited its decree to affirmance. The court pointed out that the Commission had made no "showing of a threatened violation of its order", and found "uncontradicted evidence" of record that the practices upon which the Commission made its findings of violation had long since been abandoned by petitioner. In fact, the Commission had made no application for enforcement except for a bare request at the end of its brief, unsupported save by citation of a provision of the Federal Trade Commission Act having no application to this proceeding.

As matters now stand petitioner would not feel justified in assuming the burden of bringing this case to this Court for review. Petitioner feels that it has some protection, for the time being at least, against enforcement of this order according to its terms. Petitioner believes that it is and for many years has been complying with the Robinson-Patman Act, and with this order to the extent that it has been held enforceable. Petitioner has filed its report of compliance with the Commission as required by the order. It seems unlikely that any further proceedings under the order will be taken or found necessary. If the Commission does charge violation and applies to the court for enforcement, petitioner will then have the benefit of a judicial interpretation of the order upon a specific charge of violation. If the court should find a violation and should grant enforcement, petitioner would then be able to point out the necessity for limiting the injunction, if not the

order, to the differentials found unlawful by the Commission and (if extended to other differentials) to those unlawful under the Act.

The Commission, however, is unwilling to let the matter rest upon the opinion below. It is insisting that it should have a court injunction as a matter of right, regardless of any showing of necessity, and that the Court of Appeals has no discretion in the matter. The Solicitor General, in the Commission's behalf, has filed a petition for certiorari asking this Court to review the omission of an enforcement provision from the decree. We believe there is no merit in that petition; but if this Court should be inclined to grant it then we submit that it is imperative for the protection of this petitioner's rights that the Court also review the merits of the order which the court below has purported to affirm.

The Solicitor General is asking this Court to command the Court of Appeals to enforce the Commission's order. Such a mandate by this Court no doubt would be construed as implying approval of the terms of the order, and the court below probably would feel compelled to enforce the injunction accordingly. It is prayed, therefore, that if the Solicitor General's petition is granted, this petition be likewise granted. If the Solicitor General's petition is denied, then petitioner does not urge review at this time of the questions presented by this petition.

### **Jurisdiction.**

The jurisdiction of this Court is invoked under Title 15 of the United States Code, Section 21, and Title 28 of the United States Code, Section 1254(1). The final decree of the Court of Appeals was entered on September 5, 1951 (R. 181-182).

### Questions Presented.

1. The Federal Trade Commission having found that differentials of 5% or more in the prices charged by petitioner for its roofing materials in certain local transactions with retailers and applicators were unlawful under Section 2(a) of the Clayton Act, may the Commission extend its cease and desist order

(a) to the prohibition of differentials substantially less in amount between competing customers of the same and other classes without regard to whether such lesser differentials make only due allowance for differences in seller's costs resulting from differing methods of sale or delivery?

(b) to the prohibition of differentials of any character or amount between competing customers at other locations served from other factories by different methods of distribution without regard to whether such differentials make only due allowance for seller's cost differences?

2. The respondent in a proceeding under Section 2(a) of the Clayton Act having failed to justify its lower prices as having been made in good faith to meet competition, and the Commission having found certain differentials to be unlawful, may the Commission validly prohibit all future differentials between competing purchasers without exception or exemption of lower prices thereafter made in good faith to meet the equally low prices of competitors?

3. The Commission having found that the record does not establish discrimination in price by petitioner between wholesalers, and having made no finding as to what differential in the prices charged competing wholesalers would or might be sufficient in amount to substantially affect com-



petition, may the Commission validly prohibit any differential whatever in petitioner's prices to competing wholesalers under any competitive conditions anywhere?

4. May the Commission validly issue an order having the effect of prohibiting any price differential in the sale of roofing materials to competing manufacturers of prefabricated housing, without any allegation, proof or finding as to petitioner's merchandising methods or pricing in selling to such manufacturers?

### **Reasons Relied On for Allowance of the Writ.**

This is a case of first impression. Ever since the enactment of the Robinson-Patman Act in 1936 the Commission's orders under Section 2(a) of that Act have regularly included an exception or proviso exempting differentials falling within the cost justification proviso of the Act. We believe this to be the first Section 2(a) case which has reached the courts presenting an order not containing such an exemption. We believe that this is also the first order brought up for review in which the Commission, after finding that differentials of a *certain* amount might substantially affect competition between the purchasers concerned, has prohibited *all* differentials regardless of amount. The Commission stated below that it regards this case as a "milestone" in its administration of the Robinson-Patman Act.

Furthermore, this is the first case since this Court's decision in *Federal Trade Commission v. Standard Oil Co.* (340 U. S. 231) presenting the question whether a Section 2(a) order prohibiting future price differentials between competing purchasers must include a proviso permitting the seller to meet competition in good faith within the limits of said decision.

1. The first proviso of Section 2(a) of the Clayton Act exempts from the prohibitions of that section "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered".

This order prohibits any price differential between competing purchasers of petitioner's roofing materials without regard for the fact that differentials which make only due allowance for differences in petitioner's costs are not prohibited by the Act. The granting of a quantity discount or other differential which could be so justified would be lawful, but nevertheless would violate this order.

Petitioner did not offer any evidence before the Commission that the differences in its prices to applicators and retailers in New Orleans in 1941 were justified by differences in its costs. Petitioner is, of course, foreclosed on that issue as to the discriminations then proved. But when the order is extended to the prohibition of other differentials, of any character or amount, it may not validly prohibit differentials which are within the range of cost differences resulting from different methods or quantities of sale or delivery. Even a differential of 5% in the prices charged these same New Orleans customers, or between other applicators or retailers in other areas, might be permissible when sales are made by other methods or in different quantities.

This order would prevent petitioner from offering a discount to customers purchasing in carload lots. The record shows that petitioner sells its products in carload and less-than-carload quantities, at different prices (R. 17-18). This carload differential was not involved in the transactions attacked in this proceeding, and petitioner had no

occasion to justify it. Yet this order would require petitioner to sell to all competing customers at one price, regardless of quantities purchased or method of sale or delivery.

The matter of inclusion in the order of exceptions or provisos permitting cost justification and meeting competition was presented and argued by petitioner before the Commission. Petitioner also filed exception to the failure of the trial examiner to include such provisos in his recommended order (R. 139). The Commission denied this exception (R. 142).

2. In its answer to the Commission's complaint petitioner pleaded the defense of meeting competition in good faith. In October 1945 the Commission issued its decision in the *Standard Oil* case (41 F. T. C. 263) holding that proof that the seller's lower price was made in good faith to meet the equally low price of a competitor is not a defense to a charge of unlawful price discrimination where resulting substantial injury to competition is affirmatively established. Petitioner did not press this defense at the hearings in New Orleans in the spring of 1946, but it did preserve its rights by insisting that a proviso preserving the defense as to future differentials be inserted in the order. This Court now having reversed the Commission and having held that meeting competition in good faith may provide an absolute defense in a case of this type (*F. T. C. v. Standard Oil Co.*, 340 U. S. 231), it is submitted that an appropriate proviso should be inserted in this order.

This order, if enforced according to its terms, would prevent petitioner from defending itself against a competitor's raid on its customers by meeting the competitor's price. Let us assume that petitioner is now selling its roofing materials to applicators and retailers in New

Orleans at identical prices, in compliance with the order; and that a month from now a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price, except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. Under such circumstances petitioner's customers would be easy prey to competition.

3. This order prohibits petitioner from selling its roofing materials at any differential in price *however small*; to purchasers competitively engaged in the resale or distribution of such materials *at any level of competition*. There is no qualification or proviso exempting differentials of lesser amount than those found to be sufficient to substantially affect competition. Only as to competition between applicators was there a finding that "a difference of one dollar or more" might be substantial (R. 148).

The order prohibits any differential in the prices charged competing wholesalers, jobbers or manufacturers. The Commission specifically ruled and found that the record does not establish discrimination between wholesalers (R. 140, 148-9). Discrimination between manufacturers is not even alleged. The only discriminations found were differentials of 5% or more in sales to purchasers "competing in the resale of these products as roofing contractors or applicators and as retailers" (R. 148). There is no finding that any given differential—and no finding as to what differential—in the prices charged competing wholesalers or manufacturers would be sufficient to substantially affect competition in any of the respects prohibited by Section 2(a) of the Clayton Act. Even as to retailers there is no finding that a differential of less than 2½% would be substantial. The order should have been restricted to the



prohibition of differentials between purchasers of roofing materials competing in the resale thereof as applicators or as retailers, and should have exempted differentials of less than  $2\frac{1}{2}\%$  between retailers.

Petitioner did not rely below upon any arbitrary or artificial classification of dealers in roofing materials either by itself or by the trade. It was and is conceded that petitioner's classification or designation of particular customers is immaterial. In using the terms "wholesaler", "retailer" and "applicator" we refer to purchasers in fact performing those respective functions in the resale or distribution of petitioner's products.

On this branch of the case the opinion below states petitioner's position incorrectly in several respects and thereby distorts the issues. It is stated that "petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35." The position actually taken was, and is, that one who is found guilty of exceeding a 30-mile speed limit for traveling 50 miles per hour should nevertheless not be prohibited thereafter from traveling 20 miles per hour or less. The Commission's function is to set the price differential speed limit upon evidence and findings as to what differentials may substantially lessen or injure competition. Here no speed limit was set for wholesalers, and as to retailers the limit was set at  $2\frac{1}{2}\%$ .

We believe that the Commission's failure to limit the differentials prohibited by this order to those which it has found sufficient in amount to have a probable adverse effect on competition is contrary to the decision of this Court in the *Morton Salt* case (*Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 54). The order there reviewed pro-

hibited differentials between competing wholesalers, and between competing retailers, in substantially the same language used in the present order, but each of the paragraphs contained a proviso exempting differentials of less than five cents a case which do not tend to lessen, injure or destroy competition. This Court rejected the provisos in this form, on the ground that it is the function of the Commission "to hear evidence as to given differential practices and to make findings concerning possible injury to competition"; and that the trial of this issue may not be shifted to the courts in subsequent enforcement proceedings. The court stated, however, that

"Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide".

We think the inference is clear that this Court did not give blanket approval to the outright prohibition of all differentials regardless of the evidence of record as to effect on competition; that its approval of language such as ~~is~~ used in the present order was subject to the requirement that it is the Commission's function to determine *what* differentials are substantial, and that differentials of lesser amount must be excluded by appropriate exception or proviso.

In the *Morton Salt* case this Court said further:

" \* \* \* Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not \* \* \* taken action which forbids such noninjurious differentials. \* \* \* "

That question is directly presented in this case.

**Conclusion.**

The decision of the court of appeals, and the order of the Federal Trade Commission thereby affirmed, present important questions of federal administrative law, not heretofore presented to this Court. In other respects the decision below is in conflict with well established principles previously enunciated by this Court. If this Court, upon the petition of the Solicitor General, is inclined to review the discretion of the court of appeals in omitting from its decree a provision enjoining violation of the terms of this order, then it is submitted that the validity of the order also should be reviewed, and that this petition for certiorari should be granted.

Respectfully submitted,

AUSTIN & MALKAN,

*Attorneys for Petitioner.*

By CYRUS AUSTIN

December 26, 1951.

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No. 504

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**In the Supreme Court of the United States**

OCTOBER TERM, 1951

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**THE RUBEROID CO., PETITIONER**

**v.**

**FEDERAL TRADE COMMISSION**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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**BRIEF FOR THE FEDERAL TRADE COMMISSION**

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## OPINIONS BELOW

The findings and conclusion of the Federal Trade Commission appear at R. 86-90. The opinion of the Court of Appeals (R. 95) is reported at 189 F. 2d 893. The opinion on rehearing (R. 118) is reported at 191 F. 2d 294.

## JURISDICTION

The final decree of the Court of Appeals was entered on September 5, 1951 (R. 123). The petition for a writ of certiorari was filed on December 28, 1951, and granted on January 28, 1952 (R. 131). The jurisdiction of this Court rests on Section

11 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 21, and on 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's order directing petitioner to cease and desist from discriminating in price among its customers, competitively engaged with one another in the resale or ~~distribution~~ of Ruberoid products, is too sweeping because—

(a) it makes no exception for small price differentials;

(b) it is not restricted as to territory;

(c) it does not except sales to wholesalers and manufacturers.

2. Whether, despite petitioner's failure to make an offer of proof justifying price differentials, the Commission was obliged to include provisos in its order, to the effect that it should not be construed as prohibiting differentials justifiable on a cost or meeting-competition-in-good-faith basis.

#### STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

(a) That it shall be unlawful for any person engaged in commerce<sup>to</sup> \* \* \* either directly or indirectly, to discriminate in price between



different purchasers of commodities of like grade and quality, \* \* \* where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered \* \* \*.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

~~STATEMENT~~

On July 26, 1943, the Federal Trade Commission issued a complaint (R. 1-4) charging petitioner ("Ruberoid") with having violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. The complaint alleged that Ruberoid was engaged, in competition with others, in the business of manufacturing and selling roofing materials and allied products in interstate commerce; that it was discriminating<sup>o</sup> in price between different purchasers of like products; that the purchasers were competitively engaged in the resale of the products which were the subject of the discriminations; and that the effect "has been, or may be, substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those from whom they are withheld" (R. 4).

In its answer (R. 4-7), Ruberoid admitted that it was engaged in business as alleged in the complaint; that many of its customers are competitively engaged with one another (and with customers of Ruberoid's competitors) in the resale of roofing materials and allied products; and that it grants to wholesalers a discount of 5 percent

above the discount granted retailers and "applicators."

Ruberoid denied that it had discriminated, stating that "any differentials in the prices of its products made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof, or were made in good faith to meet equally low prices of competitors" (R. 6). It also denied that its practices had the effect of injuring competition.

An initial hearing on the complaint was held before a trial examiner at New Orleans, Louisiana, on March 7, 1946, at which time Commission counsel introduced evidence of Ruberoid's discriminatory pricing practices *vis-a-vis* numerous purchasers in that trading area. Ruberoid presented no evidence to contest the showing of discriminations and no evidence to support its affirmative defenses of cost justification and lowering of prices in good faith to meet competition.<sup>2</sup> A further

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<sup>1</sup> "Applicators" refers to contractors who apply roofing materials to buildings on contract jobs for which they are paid as a whole (R. 5; 96).

<sup>2</sup> Ruberoid's petition to this Court states (p. 2): "Petitioner did not dispute that these local 1941 discriminations had occurred, nor did it attempt to justify them under the statute. The defense of meeting competition was pleaded, but was not pressed \* \* \*"

hearing was held in Washington, D. C. at which neither party sought to introduce additional evidence. Both sides accordingly rested and the record was formally closed on June 7, 1948 (R. 57).

The examiner filed a recommended decision (R. 56-77) which concluded with the proposal that general prohibitions be entered against Ruberoid's engaging in discriminatory sales practices (R. 76-77). Ruberoid filed exceptions (R. 79-84) in which it protested the entry of what it termed "a blanket injunction" (R. 83). It made no offer of proof, however, to justify the granting of differentials of any character. The Commission, after receiving briefs and hearing oral argument, made its findings of fact (R. 86), concluded that Ruberoid's practices were unlawful (R. 90), and issued an order directing it to cease and desist from discriminating in price—

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products [R. 90-91].

Ruberoid thereupon filed a petition in the Court of Appeals for the Second Circuit (R. 91-94), praying that the order be set aside or, alternatively, that it be modified in four respects by the addition of provisos and exemptions (R. 92-93). Specifically, it asked that the order be amended—



(1) By adding a proviso to the effect that the order should not be construed as prohibiting differentials which have a cost justification;

(2) By adding a proviso to the effect that the order should not be construed as prohibiting the lowering of prices to any purchaser when such action is taken in good faith to meet competition;

(3) By exempting sales to competing wholesalers and competing manufacturers from the prohibitions of the order, and limiting its effect to sales to retailers and applicators;

(4) By exempting from the prohibitions of the order differentials less in amount than those found to have a probable injurious effect upon competition.<sup>3</sup>

In its opinion, the Court of Appeals (Judges L. Hand, Augustus N. Hand, and Clark) unanimately rejected the requested modifications, affirmed the order in its entirety, and granted enforcement. In its opinion on rehearing, the court reconsidered the question of enforcement and decided (Judge Clark dissenting) that its grant was premature.<sup>4</sup> The opinion on rehearing nowise

<sup>3</sup> In this connection, Ruberoid contended (R. 93) that there was "no evidence that a price differential of less than 2½% between competing retailers" would adversely affect competition.

<sup>4</sup> In No. 448, the Commission is seeking review of this aspect of the court's decree, and a separate brief has been filed by the Commission in that case.

affects the Court of Appeals' determination that the cease and desist order was valid in all particulars.

In its petition to this Court, Ruberoid makes the various objections to the cease and desist order which it raised by its Petition to Review filed in the court below. In addition, it contends that the prohibitions of that order should not have been made applicable to sales in geographic areas other than the New Orleans trading area.

#### SUMMARY OF ARGUMENT

##### I

Ruberoid admits that the basis for issuing a cease and desist order was established, but attacks the breadth of the Commission's order, contending (a) that it should have excepted smaller differentials than those proved to have been granted in the past, (b) that it should have been limited geographically, and (c) that it should have excepted sales to wholesalers and manufacturers.

It is necessary, at the outset, to consider the character of the pleadings and of the proof, and the nature of the Commission's duties under the statute.

The Commission's complaint charged that Ruberoid unlawfully discriminated in its sales to customers competitively engaged with one another. Ruberoid entered a general denial and additionally

pleaded the affirmative defense that it could justify under the statute such price differentials as it had granted. The Commission proved numerous instances of definite price discrimination in support of its charge. This testimony went uncontradicted. Moreover, Ruberoid made no effort to meet its statutory burden of showing legal justification for the granting of differentials. Consequently, the Commission's finding that Ruberoid had engaged in the kind of unlawful conduct charged was based on uncontradicted testimony. The Commission's finding of resulting injury to competition likewise rests on substantial and uncontested proof, which was received in evidence even though there may not have been any statutory necessity for its introduction. See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 50.

Commission orders are corrective or preventive measures which are wholly prospective in their operation. As this Court has frequently recognized, it is essential to the administration of the Commission's regulatory powers that the Commission be accorded wide discretion in framing its orders. The courts will interfere only if the remedy selected has no reasonable relation to the evils proved to exist. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608. There is no question that the remedy should be sufficiently comprehensive to afford protection against similar violations in the future. Indeed, "to be of any value the

order must proscribe the *method* of unfair competition." *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F. 2d 968, 971 (C.A. 3). [italics supplied]

In the light of these considerations, Ruberoid's specific objections to the order must be rejected.

A. The instances of discrimination established by the proof involved price differentials amounting to 5 percent or more. This does not mean, however, that the Commission was obliged to except from its order discriminatory differentials falling below that mark. That is particularly true when, as here, there was testimony of competition in the trade which was so keen that even very slight differentials in the prices charged customers were material. Ruberoid's contention, carried to its logical extreme, would result in a practical frustration of the law since it would prevent the Commission from issuing orders adequate to cover any variation in the form or degree of illegal conduct.

B. The contention that the Commission's order should have been restricted to the New Orleans trading area was not made by Ruberoid in the Court of Appeals, and, for that reason alone, would seem to be unavailable to it here. But, in any event, the argument is without force. Petitioner made no offer of proof at the administrative hearings to show justification of *any* differentials. And



it made no claim that the practices shown to prevail in the New Orleans area were in any way atypical. Moreover, it affirmatively appears that the Company's pricing policies and practices are formulated on a national scale. Ruberoid's decision to rest without putting in any affirmative case invited a general proscription of the illegal methods shown to have been pursued in specific instances. In the circumstances, the Commission was certainly not required to conduct repetitive hearings throughout the country. *Cf. United States v. United States Gypsum Company*, 340 U.S. 76.

C. Ruberoid also argues that the Commission should have classified its customers along functional lines and excepted sales to wholesalers and manufacturers from the prohibitions of the order. It claims that there was no proof of discrimination in respect of sales to customers in these categories.

The Commission found that a primary means by which Ruberoid practiced discrimination was by arbitrary classification of its customers, *e.g.*, by denominating one roofing contractor a wholesaler and giving him a special wholesaler's discount, while designating another contractor, in competition with the first, a retailer and hence not entitled to similar treatment. Since Ruberoid's classification of customers did not necessarily reflect real differences in function, the Commission carefully avoided ambiguous labels and adopted terminology

which would strike directly at the illegality. It prohibited price discrimination in respect of sales to all customers "who in fact compete \* \* \* in the resale or distribution of [Ruberoid] products." In casting its order in these terms, the Commission forbade the precise conduct condemned by the Act.

So far as sales to manufacturers are concerned, it should also be noted that the order does not in any case apply, since it is in terms restricted to sales to customers engaged in the "resale or distribution" of Ruberoid products.

## II

Ruberoid also asserts that the Commission was obliged to include in its order provisos to the effect that it should not be construed as prohibiting differentials justifiable on a cost or meeting-competition-in-good faith basis. It is true that differentials so justified are beyond the condemnation of the statute. But the party claiming justification has the burden of proving the underlying facts upon which the claim is founded. *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37. If he has such proof, he must present it to the Commission. *Ibid.* Were the Commission to include the provisos sought, the order would be "potentially misleading" (Opinion of the Court of Appeals, R. 97). It would suggest that the courts were to determine *de novo*, each time a

violation was charged, the issues that were tried and adjudicated by the Commission.

If petitioner, at any future date, can show a definite change in circumstances which justifies a narrowing of the prohibitions, it can petition the Court of Appeals for appropriate modification. Moreover, if petitioner is at any time charged with contempt, it can plead facts, constituting a defense under the statute, which it has not had a previous opportunity to present. But it will not be entitled to a new hearing on matters already settled by the proceedings. In short, petitioner can still claim the benefits of the provisos in the statute to the extent that it has not already foreclosed itself on particular issues of fact. But it is in no event necessary to include the language of the statutory provisos in the order.

#### ARGUMENT

##### I

IN THE LIGHT OF RUBEROID'S FAILURE TO JUSTIFY DIFFERENTIALS OF ANY CHARACTER, THE COMMISSION WAS WARRANTED IN ENTERING A GENERAL PROHIBITION AGAINST A CONTINUED DISCRIMINATION IN SALES TO COMPETING CUSTOMERS.

Ruberoid does not deny that the Commission was warranted in entering a cease and desist order against it. It contends, however, that the order is too broad and goes beyond the proof, in that its terms cover (a) discriminatory differentials less

in amount than those found to have been granted in the past; (b) discriminatory differentials to competing customers doing business in areas other than the New Orleans trading area; and (c) discriminatory differentials to competing wholesalers and competing manufacturers.<sup>5</sup> Since the generality of the order is the focus of the attack, it is important, first, to consider the pleadings, the proof and the findings, and, second, the purpose of the statute.

The complaint charged unlawful price discriminations in Ruberoid's sales to purchasers competitively engaged with one another. Ruberoid denied that it had discriminated in fact and affirmatively claimed that its differentials in prices were justifiable under the statute (see Sections 2 (a) and (b), *supra*, pp. 2-3). In support of its charge, the Commission showed numerous instances in which Ruberoid differentiated in the prices which it charged its customers competitively engaged with one another in the New Orleans trading area, the particular differentials ranging in amount from 5 percent to 7½ percent of the purchase price. It also appeared that Ruberoid's pricing practices in all areas were centrally controlled by the company's New York office (R. 25, 42/43). Ruberoid introduced no evidence to contest the Commission's showing that discriminations

<sup>5</sup> Ruberoid seeks to limit the order to sales to applicators and retailers.



had taken place. Moreover, it made no offer of proof at any stage of the proceedings to show that differentials of any character or description could be justified, either in terms of cost factors or meeting competition.

The Commission also found, again upon uncontradicted evidence developed at the New Orleans hearing, that competition among the purchasers of Ruberoid's products was keen (R. 22-24, 26-27, 31, 32, 53-55, 89); that, for example, in the case of applicators, a difference of a dollar or more in the asking price on a roofing job might be a decisive factor in securing the business for a bidder (R. 55); and that Ruberoid itself recognized that small differences in its prices might be highly important in the trade (R. 22-24). The Commission determined that "In these circumstances customers receiving preferential discounts had a material competitive advantage over customers to whom such discounts were denied" (R. 89), and that the effect of the discriminations "may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between the purchasers receiving the benefit of such discriminatory prices and those from whom such prices are withheld" (R. 89)."

<sup>a</sup> In addition, there is, of course, a strong legal presumption that an appreciable difference in the prices charged compet-

If Commission proceedings were for the purpose of awarding compensation to injured parties or imposing punishment for past illegal acts, most certainly the Commission would be required to limit the damages or the punitive sanctions to the particular instances of violation shown by the evidence to have taken place. But Commission proceedings are neither compensatory nor punitive in character; they are strictly corrective and preventive measures "taken in the interest of the general public". *Federal Trade Commission v. Gratz*, 253 U.S. 421, 432 (dissenting opinion of Justice Brandeis); *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578, 579 (C.A. 2). Commission orders are "not retrospective, but wholly prospective in operation" (*Standard Container Manufacturers' Assn. v. Federal Trade Commission*, 119 F. 2d 262, 265 (C.A. 5)), being intended "not to punish for past acts, but to prevent the occurrence" of illegal conduct. *California Lumbermen's Council v. Fed-*

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ing-customers is injurious to competition. As stated by this Court in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 50, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." See, also, *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378, 379 (C.A. 2), certiorari denied, 326 U.S. 734.

*eral Trade Commission*, 115 F. 2d 178, 184 (C.A. 9), certiorari denied, 312 U.S. 709. It is not without significance that the Robinson-Patman Act outlaws discrimination which may be harmful to competition, and is not limited to practices which have been conclusively demonstrated to work measurable injury. See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. at 50.

This Court has indicated time and again that in the areas of trade and commerce, "the Commission has wide direction in its choice of a remedy deemed adequate to cope with the unlawful practices . . .", *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611. And "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, p. 613. Cf. *International Salt Co. v. United States*, 332 U.S. 392, 400. As we shall show in dealing with Ruberoid's specific objections, the remedy here selected by the Commission bears the required relationship to the evils found.

#### A. THE PROHIBITION OF DISCRIMINATORY DIFFERENTIALS OF LESS THAN 5 PERCENT

The specific instances of discrimination found by the Commission involved differentials of 5 percent or more. Ruberoid raises the question whether, in this circumstance, the Commission

may enter a blanket prohibition against all discriminatory differentials, however small.<sup>7</sup>

The Commission's complaint alleged an unfair and unlawful course of conduct—charging different customers different prices for like items without justification. The undisputed evidence establishes that Ruberoid pursued this course of conduct.<sup>8</sup> And Ruberoid made no offer of proof to show that differentials in any amount were justified, although justification, if any existed, would constitute a matter peculiarly within its own knowledge and one which it is required to establish affirmatively. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. at 44-45; *Samuel H.*

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<sup>7</sup> Ruberoid speaks at various points in its brief as if the Commission had prohibited all differentials in sales to competing customers. We would emphasize, however, that the order prohibits *discrimination* by means of differentials, but does not purport to hold differentials *per se* discriminatory. In the event that the Commission should charge a violation of its order, there is no question, as the Court of Appeals has pointed out, that Ruberoid could affirmatively plead that no discrimination was involved because the particular differentials in question were justified, *i.e.*, fell within the statutory exceptions. The only limitation is that Ruberoid would not be entitled to retry issues that were, or could have been, litigated in the original proceeding. See discussion, *infra*, Point II.

<sup>8</sup> The differentials were not based on quantity but purportedly rested on a classification of customers as wholesalers or retailers (R. 12, 14, 20, 56). The application of the classifications, however, was shown to be completely arbitrary (R. 87-89). Moreover, some customers were admittedly granted unpublished or secret discounts denied to others (R. 9, 15).



*Moss Inc. v. Federal Trade Commission*, 148 F. 2d at 379. Ruberoid would have it, however, that, because the specific instances which illustrate its illegal course of conduct involved unjustified differentials amounting to 5 percent or more, the Commission is precluded from proscribing discriminations in lesser amounts.

This contention, carried to its logical extreme, would enable a recalcitrant company to make a complete mockery of the Act. Take the case of a company all of whose discriminations involved price differentials of exactly 5 percent. If this circumstance should be deemed to render it impossible for the Commission to prohibit discriminations in amounts less than 5 percent, there would be nothing to prevent such a company from discriminating with impunity in the amount of  $4\frac{7}{8}$  percent, the very day after the Commission had entered a cease and desist order against it. Of course, the Commission could then undertake a new administrative proceeding to pave the way for an order prohibiting discriminations in the amount of  $4\frac{7}{8}$  percent or more. Whereupon, the company might then with impunity whittle its differentials to  $4\frac{3}{4}$  percent. By shaving the amount of the reduction very slightly on each occasion, the process might be continued *ad infinitum*.

The law requires no such exercise in futility. As has been held repeatedly, the Commission may

make its remedies effective. In *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971-972, the Court of Appeals for the Third Circuit, rejecting the contention that a Commission order was invalid because it prohibited "unfair practices in connection with several confectionery items whereas the complaint was limited to one", stated:

\* \* \* the Commission's power would be limited indeed if it were [so] restricted \* \* \*. To be of any value the order must proscribe the method of unfair competition \* \* \*. In no other way could the Commission fulfill its remedial function. •

See, also, *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 612-613; *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (C.A. 2); *Haskelite Manufacturing Corp. v. Federal Trade Commission*, 127 F. 2d 765, 766 (C.A. 7). "As this Court declared in *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 436, it is "a salutary principle that when one has been found to have committed acth in violation of a law he may be restrained from committing other related unlawful acts." Similarly, it has been held time and again in cases arising under the Sherman Act that the courts, in fashioning their decrees, are bound to take reasonable measures to preclude revival of unlawful practices (see *Ethyl Gasoline*

*Corporation v. United States*, 309 U.S. 436, 461), and that "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States*, 332 U.S. 392, 400. Plainly, the Commission's order need not be frozen fast in a mold precisely corresponding to the particular outlines and features of the specific violations found to have taken place in the past, and wholly incapable of embracing future variations in the form of the unlawful conduct.

Ruberoid argues that, at the least, the Commission's order should except from prohibition, to borrow Judge Clark's phrase, a "modest maximum." It says that, in any event, it should have been permitted to grant to retailers differentials of  $2\frac{1}{2}$  percent or less.\* It apparently recedes to this figure because its Southern sales manager admitted on examination that differentials of small amounts, and specifically of  $2\frac{1}{2}$  percent, were highly important in the realm of competition. The sales manager, it should be noted, did not testify that differentials lower than  $2\frac{1}{2}$  percent would be unimportant, but testified that com-

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\* It does not make this contention in connection with sales to applicators. As noted, *infra*, it desires to have sales to wholesalers and manufacturers completely exempted from the order.

petition in the trade was generally "keen" (R. 23). Other witnesses affirmatively testified that even very slight discriminations were material in their effect upon the conduct of the roofing business (R. 27, 31, 32, 55). The Commission so found (R. 89). Accordingly, as the court below held (R. 98), there are two definite answers to the request for a modification permitting a  $2\frac{1}{2}$  per cent differential:

First, there is nothing in the law suggesting such a limited differential; even assuming *arguendo* that the Commission perhaps might permit it on a finding of immateriality under all the circumstances, we cannot force such a finding upon it. Second, there was evidence tending to show that differentials of small amounts were important in the trade.

Ruberoid seeks comfort in this Court's opinion in the *Morton Salt* case. But, as the Court of Appeals pointed out, "that decision is quite definitely against the contention made" (R. 98). We quote from Judge Clark's cogent analysis (R. 98-99):

In that case the Commission expressly prohibited selling "to some wholesalers [or retailers as covered by a separate paragraph] thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen,



injure, or destroy competition among such wholesalers [retailers.]" The Court specifically says, 334 U.S. at page 53: "Paragraphs (a) and (b) up to the language of the provisos are approved," a statement it repeats later, 334 U.S. at page 55. It goes on to point out that the clause permitting differentials of less than five cents "would appear to benefit respondent, and no challenge to it, standing alone, is here raised." Then it considers the respondent's objection to the final clause and holds that clause invalid for a vagueness which throws the whole question into the courts. It strikes this latter part out, but, while saying that it would sustain the order with the exception of the proviso, nevertheless concludes that the deleted part is so important that the Commission "should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary."

Thus it is quite clear that an order may legally prohibit *all* differentials, and hence the form of prohibition before us is justified by the *Morton Salt* case itself. It is to be noted that the Court does not in that case expressly approve of the small differential of five cents per case there suggested by the Commission, although it is a possible inference, in view of the purpose for which the matter was returned to the Commission, that a finding in favor of such a differential would not be illegal if based on appropriate evidence. It

is clear, however, that the case does not force the Commission always to indicate some modest maximum in stating its prohibition.

Ruberoid points to the following statement in *Morton Salt* (334 U.S. at 53-54):

Whether, and under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition, we need not decide, for the Commission has not . . . taken action which forbids such noninjurious differentials.

But this question is not presented by the instant case either.<sup>2</sup> The Commission has not proscribed "noninjurious differentials." As in *Morton Salt*, its order rests upon findings that the prohibited discriminatory differentials may be injurious to competition (R. 89)—findings supported by evidence which Ruberoid did not see fit to challenge, and further sustained by a "self-evident" presumption (see 334 U.S. at 50).

#### B. THE PROHIBITION OF DISCRIMINATORY DIFFERENTIALS AS APPLIED TO OTHER TRADING AREAS

Ruberoid points out that the Commission's proof showed only that unlawful practices were followed in the New Orleans trading area. Although its brief does not press the point, it appears to question the power of the Commission to proscribe such practices in terms broad enough to cover sales in other geographic areas where Ruberoid,

a national company (R. 2, 5), does business. (Pet. 5)

We note at the outset that this contention was not made in the court below (see R. 92-93) and that petitioner would accordingly seem to be precluded from raising it at this late stage of the proceedings. *Duignan v. United States*, 274 U.S. 195, 200. There appear to be no exceptional circumstances warranting departure from the rule that this Court will restrict itself to questions that have been urged in the court of appeals. *Ibid.*

In any event, however, we think that this contention is without merit. The Commission charged (without limitation as to territory) that Ruberoid was engaged in practices violative of the Clayton Act. It proved specific instances of violation. Ruberoid offered no conflicting evidence.<sup>10</sup> And it made no claim or offer of proof calculated to show that its conduct in the New Orleans trading area was atypical.<sup>11</sup> Moreover,

<sup>10</sup> Even after it took exception to the Examiner's proposal that a general prohibition be entered, Ruberoid sought no leave to put in evidence to justify particular differentials.

<sup>11</sup> Citing R. 19-21, Ruberoid argues (Brief, pp. 3-4) that it appeared from the evidence adduced by the Commission that the New Orleans discounts resulted from local conditions and were not indicative of the company's practices elsewhere. The record does not support this statement. At R. 21, Ruberoid's southern sales manager testified as follows:

"Q. In other words, your asbestos shingle distributors, in other

as previously noted, it appears from the testimony of Ruberoid's sales manager that the Company's pricing policies and practices were national in scope and were centrally controlled (R. 25, 42-43). In these circumstances, the Commission was not required, we submit, to conduct repetitive hearings in various areas throughout the country. It was plainly entitled, without more, to "proscribe the method of unfair competition," wherever practiced. *Cf. Hershey Chocolate Corp. v. Federal Trade Commission, supra*, and cases previously cited, pp. 16-17, 20-21, *supra*. What was said in *United States v. United States Gypsum Co.*, 340 U.S. 76, 90, applies with at least equal vigor here:

The complaint of Sherman Act violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations of the

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places, don't get the same discount that the New Orleans distributor gets!

"A. Yes, they do. Our asbestos shingle distributors in other places receive the same discounts, but I have pointed out—I wish to point out, in other localities, we may sell two accounts; say, if we are dealing with two accounts—usually we deal with one. If we deal with two accounts, one account may be a recognized wholesaler, and the other account will be specifically a retail merchant, and we provide a difference there—

"Q. Now, that's—

"A. To the extent of 5 percent."

See, also, his testimony at R. 25-26.



Sherman Act in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce.

C. THE FAILURE TO INCLUDE A SPECIFIC EXEMPTION FOR SALES TO WHOLESALERS AND MANUFACTURERS

1. *Sales to wholesalers*

As Ruberoid points out, in many instances Commission cease and desist orders issued under Section 2 of the Clayton Act have undertaken to classify customers by functional designations. Thus, in *Morton Salt*, one paragraph of the order forbade discriminatory sales to *wholesalers* competitively engaged with one another in the distribution of Morton's table salts, while a second paragraph was made applicable to sales of the same products to *retailers* (334 U.S. at 51, f.n.). It does not follow, however, that the Commission is required to adhere to a particular classification formula and that no other method of denoting the incidence of the order will do. The statute declares it "unlawful for any person \* \* \* to discriminate in price between different purchasers of commodities of like grade and quality \* \* \* where the effect of such discrimination may be substantially to lessen competition \* \* \* in any line of commerce \* \* \*". Obviously, then, the Commission could frame its order to prohibit Ruberoid from discriminating in price—

By selling [its] products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. [R. 90-91]

The order is eminently plain in its meaning and application. It strikes directly at the precise evil condemned by the Act.

In the instant case, the Commission had excellent reason to eschew the descriptive terms "wholesaler," "retailer," "applicator," and to adopt the designation "purchasers who in fact compete." As used by Ruberoid, the former terms were ambiguous. Arbitrary classification of customers was one of the primary devices by which discrimination was perpetrated. Thus, the record establishes that Ruberoid treated the following applicators as wholesalers and granted them its so-called wholesaler discount of 6 percent plus 5 percent—

National Roofing (Comm. Exs. 2, 8, 23, 35, 37, 43, 45, 47, 49a and b);

F. J. Villars (Comm. Exs. 4, 19, 21, 41);

Brandin Slate (Comm. Exs. 6, 12, 14, 16, 19, 25, 32, 34, 51, 55); and

Hibernia (Comm. Exs. 10, 29, 31);

At the same time, it denied such classification and discount to the following purchasers who were

competitively engaged with the above purchasers as applicators—

A. H. White (Comm. Exs. 1, 3, 11, 17, 26, 42, 44, 46, 48, 50);

David Usner (Comm. Exs. 5, 9, 13, 22, 33, 52);

Jordy Bros. (Comm. Exs. 7, 15, 18, 24);

Modenbach (Comm. Exs. 20 and 38);

Chassaniol (Comm. Exs. 30 and 36); and

Dietrich (Comm. Ex. 56).<sup>12</sup>

In short, Ruberoid did not actually sell to purchasers on the basis of functional differences. Its functional classifications were a facade for discrimination. The Commission took full account of this in its Findings, stating (R. 89):

There is sharp disagreement between counsel as to whether the record establishes discriminations by respondent among wholesalers. In the opinion of the Commission, the trial examiner is correct in his conclusion that there is insufficient evidence to establish such discriminations. However, as the trial exam-

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<sup>12</sup> Some of the invoices disclose the fact that, in addition to the so-called wholesaler discount of 6 percent and 5 percent granted its favored purchasers, petitioner granted these purchasers, in various instances, an additional discount designated "competitive discount on 'A' products" or "competitive discount" which petitioner did not grant to other purchasers competing with the favored purchasers *in the same area under exactly the same competitive conditions* (see Comm. Exs. 2, 4, 6, 12, 19, 21, 23, 25, 27, 32, 34, 37, 39, 40, 41, 47, 49b, 53, 54, 55, 57).

iner points out, there is some confusion on this point due to the fact that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator.

The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers.

The Court of Appeals quite correctly held that the Commission was justified "in concluding that there was no real functional difference necessarily disclosed by petitioner's classification of its customers and that the order should hit the evil directly, rather than invite evasion by incorporating an ambiguous label" (R. 98).



Ruberoid states that the Commission did not find discrimination in sales to "wholesalers" and proceeds to argue that accordingly such sales should have been exempted. What it obscures or ignores is the finding of the Commission that Ruberoid's use of the term "wholesaler", as reflected by its application of that classification to various customers, was an ambiguous label.<sup>18</sup>

Ruberoid is not precluded by the Commission's order from selling to customers doing business at different competitive levels at different prices. It may differentiate, for example, between one whose operations are confined to wholesaling and another who is exclusively a retailer. But, under the Commission's order, it may no longer discriminate between two customers competing with one another by the simple expedient of calling one a wholesaler and the other a retailer. " \* \* \* [W]here a supplier sells at different prices to different purchasers who may be or become competitors, he must keep himself informed as to the true nature and scope of the business activities of his customers, if he would avoid violation of the Robinson-Patman Act." Cyrus Austin, *Price Discrimination and Related Problems Under the Robinson-*

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<sup>18</sup> Note, also, in this connection, the Court of Appeals' observation (R. 98) that "an 'applicator' who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler; moreover, as the Commission pointed out, there was no rigid differentiation of function."

*Patman Act*, American Law Institute (1950) p. 52. That is precisely what Ruberoid has failed to do in the past and what the Commission's order requires it to do in the future.

## 2. Sales to manufacturers

Ruberoid also complains that the order fails to except sales to manufacturers. For the reasons already stated, we believe that the Commission was not required to cast its order in terms of sales to persons falling within specified functional classifications, and that the prohibitions might "hit the evil directly."

We would add, however, that, so far as sales to manufacturers are concerned, petitioner is setting up a straw man. The Commission's order forbade discrimination in connection with the sale of Ruberoid products to persons competitively engaged with one another "in the resale or distribution of such products" (R. 91). By definition, other manufacturers are not engaged in the resale and distribution of Ruberoid products. If they were, they would not be performing the function of manufacturers, but that of wholesalers, distributors, or retailers, in which event there would be no reason whatever to place them beyond the reach of the order.

The illustration which Ruberoid has used in connection with its contention concerning sales to manufacturers exposes the fallacy in its argument.

It has urged that "petitioner might be held in violation of [the] order if it sold shingles or siding at slightly different prices to two competing manufacturers of prefabricated houses" (Brief, p. 19).

Palpably, that is not so. Manufacturers of prefabricated houses are not engaged in the "resale or distribution" of shingles and siding any more than manufacturers of men's clothing are engaged in the resale or distribution of buttons and thread.<sup>14</sup>

Petitioner's sales manager referred to American Can Company, General Motors, or "any of the steel mills" as buyers which would fall in the category of manufacturing concerns (R. 9). It cannot be seriously suggested that sales to such buyers fall within the proscriptions of the order. If, however, a manufacturing concern should be incidentally engaged in the business of acting as a sales outlet for Ruberoid products, and competitively engaged, in that aspect of its business, with other distributors of Ruberoid products, it would not be beyond reach of the order. Clearly, on those facts it should not be.

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<sup>14</sup> It is equally obvious that "applicators", i.e., persons who are engaged in the business of reselling roofing products to consumers on a contract basis (R. 2, 5) are engaged in "resale or distribution" of those products.

## II

THE COMMISSION WAS NOT REQUIRED TO INCORPORATE IN ITS ORDER THE PROVISOS SET FORTH IN SECTION 2 OF THE CLAYTON ACT

After describing the kind of price discriminations which "shall be unlawful," Section 2 (a) of the Clayton Act declares:

*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered \* \* \*.

Section 2 (b) provides in substance that if the Commission charges discrimination and makes out a *prima facie* case, the affirmative burden of showing justification shall be upon the person charged with violation. In the absence of such showing, the Commission is authorized to enter an order terminating the illegal practice. The Section then adds:

*Provided, however*, That nothing herein contained shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.



Ruberoid contends that, even though it failed to make any showing of justification at the hearing on the complaint, the Commission was obliged to include provisos in its order, to the effect that it should not be construed as prohibiting differentials which can be justified on a cost or meeting-competition-in-good-faith basis.

The burden of proving that a seller comes within one of the Act's exceptions is placed squarely upon the one who claims it. Section 2 (b); *Federal Trade Commission v. Morton Salt Co.*, *supra*; *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 250; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 741. Ruberoid pleaded justification of differentials but failed to introduce any proof or to make any offer of proof in support of its affirmative defenses. This it admits (Brief pp. 4, 11-12). Certainly, in such circumstances, the Commission was not required to include in its cease and desist order language preserving to Ruberoid the defenses which it raised but did not sustain before the Commission.

The decision in the *Morton Salt* case indicates that the inclusion of the provisos sought by the petitioner would be inappropriate. This Court stated (334 U.S. at 54):

The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here

present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C. §§ 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order.

Whether a seller's apparently discriminatory practices can be justified by cost factors or by the low prices of a competitor are questions of fact to be ascertained by the Commission. Those issues were posed by the Commission's complaint and Ruberoid's answer. If the Commission's order were cast in terms suggesting that those issues remained open, the order would appear to be shifting to the courts the task of trying *de novo* the issues adjudicated by the Commission pursuant to statutory direction. As stated by the Court of Appeals, inclusion of the provisos sought would be "potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled" (R. 97).

Ruberoid raises the following hypothetical issue (Brief, p. 14):

Let us assume that petitioner is now selling its roofing materials to applicators and re-

tailers in New Orleans at identical prices, in compliance with the order; and that tomorrow a competing manufacturer offers one of these customers a lower price for a comparable product. Under this order petitioner would be prohibited from meeting the competitor's price, except by lowering its price to all of its customers in that area, which this Court has held the statute does not require. \* \* \*

Ruberoid, however, overlooks the fact that the Court of Appeals retains full power to modify its decree and that it will become incumbent upon it to exercise that authority in the event petitioner shows a definite change in circumstances warranting the grafting of an exception upon the prohibitions of the order. See *American Chain & Cable Co. v. Federal Trade Commission*, 142 F.2d 909, 912-13 (C.A. 4); *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F.2d 443, 447 (C.A. 7); cf. *United States v. Morton Salt Co.*, 338 U.S. 632; *United States v. Swift & Co.*, 286 U.S. 106. The naked possibility that Ruberoid, at some future date, may be able to show that new conditions justify its granting certain price differentials to particular customers does not compel the inclusion of a catch-all proviso in advance of the event. As indicated in *Morton Salt*, the prohibitions of the Commission's final order should not be subject to exceptions so amorphous and imprecise that the courts will be required to direct a new hearing to

determine the order's coverage each time a question of violation arises. There are surely other and better means of accommodating the order to changed circumstances that may conceivably arise.

The situation is not unlike that considered by this Court in *International Salt Co. v. United States*, 332 U.S. 392. The issue there was whether this Court should modify an antitrust decree entered by a district court. Holding that the judgment should not be refashioned "to meet a hypothetical situation," the Court observed that it could be modified "if and when the need arises" (p. 401). The Court added (pp. 401-402):

The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below \* \* \*.

We respectfully submit that the same course should be followed here.

The court below has also pointed out that Ruberoid will not be in contempt of the existing order if it can show, in answer to an alleged violation, that



there are facts constituting a statutory defense which it has not had a previous opportunity to present. It stressed, however, (R. 97) that "Only in the event of a definite change of circumstances will a new hearing on the facts be justified."<sup>15</sup>

We believe that the Court of Appeals was correct in its conclusion (R. 97) that "it is surely not necessary to repeat the wording of the statute in the order itself." Insertion of the provisos is "not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled" (*ibid.*).

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<sup>15</sup> This Court's opinion in *Morton Salt* also recognized that in some cases "compelling reasons" might require a new hearing on questions of fact (334 U.S. at 54). It may be noted that the court of appeals can refer such questions, when they arise in an enforcement proceeding, to the Commission as a special master. This procedure has been adopted frequently. See, e.g., *Federal Trade Commission v. Balme*, 23 F. 2d 615, 621 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission v. Standard Brands Inc.*, 189 F. 2d 510, 512 (C.A. 2); *Federal Trade Commission v. Herzog*, 150 F. 2d 450, 452 (C.A. 2); *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (C.A. 4).

## CONCLUSION

The final decree of the Court of Appeals, insofar as it sustains the validity of the Commission's order, should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,

*Solicitor General,*

H. G. MORISON,

*Assistant Attorney General,*

RALPH S. SPRITZER,

DANIEL M. FRIEDMAN,

*Special Assistants to the  
Attorney General.*

W. T. KELLEY,

*General Counsel,*

JAMES W. CASSEDY,

*Assistant General Counsel,*

*Federal Trade Commission.*

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